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No. 05-785

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS L. CAREY, WARDEN, *Petitioner,*

v.

MATHEW MUSLADIN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
DONALD E. DE NICOLA
Deputy Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
GREGORY A. OTT
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5964
Fax: (415) 703-1234
Counsel for Petitioner

QUESTIONS PRESENTED

In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

THOMAS L. CAREY, WARDEN, *Petitioner,*

v.

MATHEW MUSLADIN, *Respondent.*

Thomas L. Carey,[1] Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 427 F.3d 653. Petition Appendix ("App.") 1a-18a. Its order denying rehearing and rehearing en banc is reported at 427 F.3d 647. App. 19a-30a. The opinion of the United States District Court for the Northern District of California denying the petition for writ of habeas corpus is unreported. App. 31a-54a. The opinion of the California Court of Appeal affirming the judgment of conviction, and its order denying rehearing, are unreported. App. 55a-78a, 80a. The orders of the California Supreme Court denying direct review and denying the petition for writ of habeas corpus are unreported. App. 79a, 81a.

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1. Musladin's custodian in the federal district court and court of appeals, Warden Anthony Lamarque, has retired. Musladin is presently in the custody of Warden Thomas L. Carey.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed on October 21, 2005. An order denying the Warden's petition for panel rehearing and rehearing en banc was filed on the same day. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides that no state "shall deprive any person or life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 2254(d)(1) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pub. L. No. 104-132, § 104, 110 Stat. 1218.

STATEMENT OF THE CASE

1. In 1994, respondent Mathew Musladin was involved in a child custody dispute with his wife Pamela, from whom he had been separated for a year and a half. One afternoon shortly after Pamela's new boyfriend, Tom Studer, had begun living with her, Musladin came to Pamela's house ostensibly to pick up his young son for visitation. Pamela and Musladin met in front of the house, where Musladin shoved her to the ground. Studer and Pamela's brother Mike emerged from the house to help

Pamela. Musladin retrieved a handgun from his car, and shot Studer, hitting him in the shoulder and knocking him down. When Studer crawled into the garage attempting to escape, Musladin followed and shot him in the head as Studer lay on the floor, killing him. Musladin fled but was quickly arrested. App. 55a-58a.

Before trial, outside the presence of the jury, Musladin's counsel objected to spectators, members of Tom Studer's family, wearing buttons[2] that depicted Studer:

> [Defense counsel]: . . . . And this is about this matter and I just want to put on the record, Your Honor. This is in all due respect to the Studer family who is present here in the courtroom.
>
> I think it's inappropriate. They are wearing buttons that show a photograph of the decedent. I would like to just say for purposes of the record, Your Honor, this is a jury trial. If it was a court trial, I wouldn't mind. As jurors sit here, they have natural feelings and natural passions. They could be inflamed over the fact that there was a photograph on Ms. Studer's breast or photograph of the decedent on Mr. Studer's chest or on the brother's chest. I just think it's inappropriate, Your Honor. I would like to have – they can stay here. There is no problem with that.
>
> THE COURT: I understand that. The button has nothing except a photograph?
>
> [Prosecutor]: That's correct, Your Honor.
>
> THE COURT: The jury's already been instructed not to let passion or prejudice influence their verdict and they will again be instructed at the close of the case on the same subject. There is no legend on the buttons. I see no possible prejudice to the defendant. The motion to have those removed is denied.

App. 73a-74a.

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2. Neither the button nor the picture on it was in evidence, and neither one was seen by any court other than the state trial judge. *See* App. 73a-74a.

At trial, Musladin testified to shooting Studer in self-defense. App. 58a-60a. The jury convicted Musladin of first degree murder, attempted premeditated murder, first degree burglary, and assault with a firearm, with personal use of a firearm. He was sentenced to thirty-two years to life in prison. App. 33a, 55a.

2. The California Court of Appeal affirmed the judgment, rejecting Musladin's contention that the display of the spectators' buttons had deprived him of a fair trial. Citing *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986), the state appellate court found that Musladin had to show inherent prejudice from the presence of the buttons. "The test for inherent prejudice is . . . whether an unacceptable risk is presented of impermissible factors coming into play. This test requires us to examine two factors: first, whether there is an impermissible factor coming into play, and second, whether it poses an unacceptable risk." App. 74a (quoting *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991) (quoting *Flynn*, 475 U.S. at 570, and *Estelle v. Williams*, 425 U.S. 501 (1976))). Using that test the state court distinguished *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), which overturned a conviction where several female spectators had worn large buttons reading "Women Against Rape" at a rape trial. The state court held:

> the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims in a courtroom to be an "impermissible factor coming into play," the practice of which should be discouraged, we do not believe the buttons in this case branded defendant "with an unmistakable mark of guilt" in the eyes of the jurors. (See *Holbrook* v. *Flynn*, *supra*, 475 U.S. at 570-571.)

App. 74a-75a. Rehearing was denied, and the California Supreme Court denied review. App. 79a-80a.

3. In 1999, Musladin filed a petition for writ of habeas corpus in the California Supreme Court. Musladin attached to his petition two declarations alleging facts outside the trial record: The buttons were between two and four inches in diameter, and were worn by Studer's mother, father, and brother, each of whom attended most or all of trial and sat in the front row of the gallery, behind the prosecutor. *See* App. 48a. The petition was denied without comment in 2000. App. 81a.

4. The same year, Musladin sought a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In denying relief, the district court noted that the Supreme Court has not specifically addressed spectator buttons and distinguished both *Estelle v. Williams*, 425 U.S. 501, which had held that compelling a defendant to wear jail clothing at trial violates the right to a fair trial, and *Norris v. Risley*, 918 F.2d 828, which had involved courtroom practices "related directly to the respective defendant's guilt." The district court found the "message to be derived from the buttons in this case . . . was not as clear" as that conveyed by the courtroom practices in *Estelle* and *Norris*. "Although it amounted to a showing of solidarity by the victim's family, it did not necessarily undermine the presumption of innocence." The district court concluded, "Although allowing the buttons was arguably not a prudent decision by the trial judge, it cannot be said that it was contrary to or an unreasonable application of clearly established federal law" as set forth in *Estelle*. App. 47a-50a, 54a.

5. On appeal, a divided panel of the Ninth Circuit reversed and directed issuance of the writ. *Musladin v. Lamarque*, 403 F.3d 1072 (9th Cir. 2005). The Warden filed a petition for rehearing with a suggestion for rehearing en banc.

6. On October 21, 2005, the Ninth Circuit substituted a new published opinion, without a change in the judgment. *See* App. 1a-15a. In an opinion authored by Circuit Judge Reinhardt, the Ninth Circuit held the state court's rejection of constitutional error in allowing the spectator's buttons was an unreasonable application of *Estelle v. Williams*, 425 U.S. 501, and *Holbrook*

v. Flynn, 475 U.S. 560. The Ninth Circuit accorded its pre-AEDPA decision in *Norris v. Risley*, 918 F.2d 828, "persuasive value" in deciding that the state court's application of *Estelle* and *Flynn* was unreasonable, particularly because the state court had discussed *Norris*. App. 7a-9a. *Norris*, according to Ninth Circuit, could not "reasonably be distinguished," for the "message conveyed" by the buttons in the present case was "even stronger and more prejudicial" than the "Women Against Rape" buttons worn by the *Norris* spectators. App. 8a, 13a. Specifically, the three buttons depicting Studer "essentially 'argue' that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and thus, the perpetrator of a criminal act." App. 13a. The Ninth Circuit additionally found that the state court unreasonably applied *Estelle* and *Flynn* by burdening Musladin with an unnecessary element of proof, namely, that the buttons "branded" Musladin with an "unmistakable mark of guilt." The federal appeals court held that once the state court found an "impermissible factor," reversal was required without Musladin having to show that he had been "branded." App. 10a-12a, 15a.

Senior Circuit Judge Thompson dissented, finding that the state court's decision was not contrary to nor an unreasonable application of established Supreme Court law. Judge Thompson found neither *Estelle* nor *Norris* sufficiently analogous to Musladin's case to compel relief, since the "message," if any, conveyed by the Studer family buttons was nothing more than the "normal grief occasioned by the loss of a family member." The state-court's reference to its view that the buttons had not "branded" Musladin, Judge Thompson explained, was simply shorthand for holding that the buttons were not so inherently prejudicial as to violate the defendant's right to a fair trial. App. 15a-18a.

7. On the same day, the Ninth Circuit denied the Warden's petition for rehearing and rehearing en banc in a published order. App. 19a. Judge Kleinfeld (joined by Judges Kozinski,

O'Scannlain, Tallman, Bybee, Callahan, and Bea) dissented. Judge Kleinfeld contended that the court had "effectively erased" 28 U.S.C. § 2254(d) and that the panel's inquiry should have begun and ended with the fact that no clearly established Supreme Court case holds "silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence." He criticized the court's wholesale substitution of *Norris*, to fill in conclusively a blank between the two remotely analogous "bookends," *Estelle* and *Flynn*. Judge Kleinfeld perceived a circuit split on the extent to which circuit or state court decisions may be relied upon to grant relief under 28 U.S.C. § 2254(d)(1) and anticipated the decision would confuse state courts, which will not know whether to follow circuit or Supreme Court law to avoid reversal on federal habeas corpus. He criticized the panel's narrow and unyielding interpretation of the effect of the buttons, explaining that spectator alliances with a defendant or the prosecution are common, not improper, and part and parcel of the constitutional guarantee of a public trial. App. 20a-29a. Judge Bea (joined by Judges Kozinski, O'Scannlain, and Kleinfeld) also dissented. Judge Bea opined that the court had erroneously treated an "inherently prejudicial" courtroom practice as structural error, contrary to *Estelle* and *Flynn*. App. 29a-30a.

8. On November 2, 2005, the Ninth Circuit granted the Warden's motion for a ninety-day stay of the mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit violated AEDPA by failing to defer to a state court decision that reasonably fits within the matrix of this Court's broad due-process standard, and by granting relief on the basis of its own Circuit law rather than on the law "clearly established" by the holdings of this Court's precedents. The need for certiorari review is heightened given the inconsistent positions of federal circuit courts on the relevance of circuit or

state authority as a basis for habeas relief under § 2254(d)(1). In addition, and in violation of *Woodford v. Visciotti*, the Ninth Circuit selectively parsed the state-court opinion to tease out what it mistakenly characterized as an incorrect standard employed by the state court. Finally, contrary to *Deck v. Missouri*, the Ninth Circuit erroneously conflated the notion of "inherent prejudice" with that of structural error, concluding that a finding of inherent prejudice requires reversal without further inquiry.

A. The Ninth Circuit Based Habeas Relief On Its Own Pre-AEDPA Circuit Case And Without Any Deference To The State Court's Opinion, In Violation of AEDPA

1. "A necessary condition for federal habeas relief here is that the state court's decision be 'contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Kane v. Espitia*, 126 S. Ct. 407, 408, 163 L. Ed. 2d 10, 12 (2005) (per curiam). In determining what constitutes clearly established federal law for purposes of § 2254(d)(1), only this Court's holdings from the time the state court rendered its decision—not dicta or circuit court authority—are controlling. *See Kane v. Espitia*, 126 S. Ct. at 408, 163 L. Ed. 2d at 12-13; *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). No Supreme Court authority addresses the constitutionality of spectators wearing buttons or like paraphernalia in a courtroom at a criminal defendant's trial. *See Kane v. Espitia*, 126 S. Ct. at 408, 163 L. Ed. 2d at 12-13.

2. The Ninth Circuit acknowledged, as the state court found, that *Estelle v. Williams*, 425 U.S. 501, and *Holbrook v. Flynn*, 475 U.S. 560, while not involving similar circumstances, provide the closest Supreme Court authority for reviewing a claim of constitutional error in permitting spectators to wear buttons at the defendant's trial. The relevant inquiry is whether

the challenged courtroom practice "was so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial." *Flynn*, 475 U.S. at 570.

In *Estelle*, the Court held that forcing a defendant to wear prison clothes at trial is inherently prejudicial. 425 U.S. at 530 n.10. In *Flynn*, the Court held that the presence of several armed uniformed officers in the spectators' row directly behind the defendant is not inherently prejudicial. 475 U.S. at 568-69. To the extent these decisions relate at all to courtroom spectators wearing buttons depicting a deceased family member, they permit the States to apply a broad rule of due process. This Court has held that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The question for the federal habeas court is whether the state court's decision fits within the overall "matrix" of this Court's prior decisions. *Id.* at 665; *see Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); *Lockyer v. Andrade*, 538 U.S. at 76 (holding where the "precise contours" of Supreme Court law were unclear, state court decision was not unreasonable).

3. The federal appeals court failed to accord sufficient deference to the state court's judgment. The "message" a juror might glean from a button bearing only a photograph of the victim is a highly subjective matter. As the dissents below reflect, the state court's interpretation of the buttons as conveying nothing more than a family's grief, a matter not inherently prejudicial, was clearly within the *Estelle* "matrix" of reasonable outcomes. App. 17a-18a, 26a-27a, 49a; *see Yarborough v. Alvarado*, 541 U.S. at 665. Judge Thompson noted correctly that "it is difficult to distinguish this case from the routine situation of a deceased victim's family members, without buttons, sitting as a group in a courtroom during trial. Jurors in such a trial surely would recognize the group for what

it is." App. 17a; *accord* App. 26a-27a; *see Kinnamon v. Scott*, 40 F.3d 731, 734 (5th Cir. 1994). Tom Studer's family was bereaved by his death. That fact could manifest itself in tears or hand-holding or other displays just as much, if not more so, as in a small token of his likeness in tribute to his memory. Neither the emotion nor its manifestation would be any surprise to a jury. Families support loved ones, be they victims or defendants, aggressors or defenders. *See* App. 26a-27a.

Contrary to the "reason, principle, and common human experience" compelled by this Court's decisions, *Estelle v. Williams*, 425 U.S. at 504, the circuit court ignored even the possibility of more than one interpretation of an ordinary button bearing only a photograph. It found no reasonable jurist would disagree that the buttons conveyed the "clear and unmistakable" message that Musladin was guilty. App. 13a-14a. The opinions of the state court, the federal district court, and eight federal circuit judges show "fair-minded jurists could disagree" about that conclusion and reasonably so. *See Yarborough v. Alvarado*, 541 U.S. at 664. The decision of the Ninth Circuit plainly disregards the requirement of deferential review.

4. Not only did the Ninth Circuit ignore the requisite deference to the state court's opinion, it ignored AEDPA's requirement that the only source of clearly established law is that of this Court. The Ninth Circuit did not grant habeas relief based on an analysis or comparison of *Estelle* or *Flynn* to the instant case. Indeed, the circuit court did not juxtapose those decisions against Musladin's claim at all. *See* App. 6a-9a. Instead, the Ninth Circuit reversed Musladin's murder conviction based on its own pre-AEDPA decision in *Norris v. Risley*, 918 F.2d 828. In *Norris*, it concluded a rape defendant's right to a fair trial was violated because several spectators sat in the gallery during trial wearing "Women Against Rape" buttons. *See* App. 7a-9a, 13a-14a, 24a. Though *Norris* was decided under de novo review, as opposed to the "highly deferential" standard commanded by AEDPA, *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam), the Ninth Circuit suggested

that *Norris* was *particularly compelling precedent* because the state court had discussed and distinguished it in Musladin's direct appeal. *See* App. 8a-9a. This Court has never suggested, in or out of AEDPA's context, that if a state court discusses lower court authority it is somehow bound to follow that authority. A state court need not cite or even be aware of applicable *Supreme Court* authority. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Since circuit authority is not controlling under § 2254(d)(1), surely a state court may ignore, address, or even misapply circuit law without thereby suffering reversal under § 2254(d)(1).

The Ninth Circuit's wholesale reliance on *Norris* is strikingly similar to its reliance on circuit authority condemned in *Kane v. Espitia*, 126 S. Ct. 407, 163 L. Ed. 2d at 13. In *Kane v. Espitia*, this Court reversed the Ninth Circuit's grant of habeas relief which the Ninth Circuit had based on circuit authority that a self-represented defendant has a constitutional right to access to law materials. 126 S. Ct. at 408-09, 163 L. Ed. 2d at 12-13. This Court explained that *Faretta v. California*, 422 U.S. 806 (1975) had "clearly established" a defendant's Sixth Amendment right to self-representation, but had said "nothing about any specific legal aid that the State owes a *pro se* criminal defendant." *Kane v. Espitia*, 126 S. Ct. at 408, 163 L. Ed. 2d at 13. In the AEDPA context the disagreement among circuit courts on whether *Faretta* implied such an access right was simply irrelevant since *Faretta*'s silence on the point barred habeas relief. *See Kane v. Espitia*, 126 S. Ct. at 408, 163 L. Ed. 2d at 13. In the present case, the Ninth Circuit, again, disregarded a void in established Supreme Court law, and followed its own circuit decisional authority. As certiorari was warranted in *Kane v. Espitia*, it is warranted here.

5. Certiorari is also warranted to resolve the confusion that otherwise will result from the Ninth Circuit's decision. As Judge Kleinfeld pointed out in his dissent, the opinion creates uncertainty for the state courts in that circuit, which will be unsure whether Ninth Circuit precedent is binding in criminal

cases within those jurisdictions. Judge Kleinfeld cogently argued that the panel's decision effectively turns the Ninth Circuit into "the Supreme Court of the nine states in our circuit." App. 28a-29a.

The Ninth Circuit's ongoing analytical approach of resorting to its own decisional authority as an adequate ground for overturning criminal judgments in AEDPA cases demonstrates that the role of lower court authority in determining what is "reasonable" under § 2254(d)(1) requires definitive resolution. This Court has indicated that the existence of circuit and state cases reaching the same result as the state court "under similar circumstances" may confirm that a state court's decision was reasonable. *Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003). Circuit decisions are not entirely consistent on the proper analysis. Some circuits find that lower federal court decisions are instructive on whether a given application of Supreme Court authority is reasonable. *See, e.g., Ouber v. Guarino*, 293 F.3d 19, 26-27 (1st Cir. 2002) ("it is helpful to examine precedents from lower federal courts to determine how the general standard applies to a particular set of facts"); *Matteo v. Superintendent*, 171 F.3d 877, 890 (3d Cir. 1999) (federal courts not "precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable"); *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003) ("the objective reasonableness of a state court's application of Supreme Court precedent may be established by showing other circuits having similarly applied the precedent"). Other circuits are more restrictive in their application of lower court authority in reviewing state-court judgments, essentially treating such authority as "dicta." *See, e.g., Mitzel v. Tate*, 267 F.3d 524, 531 (6th Cir. 2001) ("We may not look to the decisions of our circuit, or other courts of appeals, when 'deciding whether the state court decision is contrary to, or an unreasonable application of, clearly established federal law.'"); *Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) ("any independent opinions we offer on the merits of the

constitutional claims will have no determinative effective in the case before us, nor any precedential effect for state courts in future cases. At best, it constitutes a body of constitutional dicta."); *Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir. 1996) ("Federal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court caselaw.").

Despite inconsistency among the federal courts, there appears to be no authority supporting the Ninth Circuit's view that a pre-AEDPA circuit decision by itself may dictate that a given state court decision was an unreasonable application of Supreme Court authority under § 2254(d)(1). This Court should grant certiorari to make clear that the use of circuit authority *qua* established Supreme Court law is contrary to § 2254(d)(1).

B. The Ninth Circuit Selectively and Unreasonably Interpreted the State Court Opinion

1. "Shorthand" or even "imprecise" recitations of an applicable standard by a state court do not invalidate that court's reasoning so long as the "fair import" of the court's decision is that the correct standard was applied. *Woodford v. Visciotti*, 537 U.S. at 24. "Formulary statements" of an applicable standard need not be given by a state court for its opinion to withstand scrutiny under 28 U.S.C. § 2254(d)(1). *Early v. Packer*, 537 U.S. at 9. To conclude otherwise would be inconsistent with the presumption that state courts know and follow the law, as well as § 2254(d)'s "'highly deferential standard for evaluating state-court rulings,'" which "demands that state court decisions be given the benefit of the doubt." *Visciotti*, 537 U.S. at 24 (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 (1997)).

The Ninth Circuit flouted the foregoing directions of this Court. The Ninth Circuit interpreted the opinion of the state court to have "imposed an additional and unduly burdensome requirement" on Musladin: "demanding that the challenged

practice cause the 'brand[ing]' of the defendant with an 'unmistakable mark of guilt[]' – even thought the *Williams* test for inherent prejudice had already been met." App. 10a. That interpretation of the state-court's decision by the federal circuit court exemplifies a "readiness to attribute error" rejected by this Court as inappropriate under AEDPA. *Woodford v. Visciotti*, 537 U.S. at 24.

Moreover, the Ninth Circuit plainly misread the opinion by the state court. In its appellate decision the state court set forth the correct standard for evaluating Musladin's claim, and identified the most closely applicable cases of this Court, *Estelle v. Williams*, 425 U.S. 501 and *Holbrook v. Flynn*, 475 U.S. 560. App. 9a; *see* App. 74a-75a. After finding the "simple photograph" of the victim on the buttons "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member," the state court concluded: "While we consider the wearing of photographs of victims in a courtroom to be an '*impermissible factor coming into play*,' the practice of which should be discouraged, *we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors*." App. 75a (quoting *Holbrook v. Flynn*, 475 U.S. at 570-71) (emphasis added).

Seizing on that last sentence, the federal circuit court ascribed to the state court a finding not merely of an "unacceptable risk" of "impermissible factors coming into play," but a finding that an "impermissible factor" *had* come into play, and thus that inherent prejudice had been established. The Ninth Circuit reasoned that having found inherent prejudice, the state court erroneously required Musladin additionally to show the buttons had branded him with an unmistakable mark of guilt. App. 10a.

This highly strained interpretation of the state court's opinion is neither reasonable nor consistent with AEDPA. As Judge Thompson cogently observed, "the state court's 'impermissible factor' comment is most reasonably understood as reflecting that court's view that buttons bearing a victim's photograph

should not been worn in a courtroom." App. 17a. "[T]he state court's additional comment that the buttons did not 'brand[] defendant "with an unmistakable mark of guilt"' is most reasonably understood as an explanation that the buttons were not 'so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial.'" App. 18a (quoting *Holbrook v. Flynn*, 475 U.S. at 572).[3] The Ninth Circuit's unreasonable and selective interpretation of the state court's opinion this Court's intervention.

C. The Ninth Circuit Found That an Inherently Prejudicial Courtroom Practice Constitutes Structural Error, Contrary to this Court's Jurisprudence

1. *Deck v. Missouri*, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) explained that the employment of an "inherently prejudicial" courtroom practice, in that case shackling, may relieve the defendant from proving *actual* prejudice to establish a due process violation. 125 S. Ct. at 2015. The Court did not, however, suggest such errors were structural, but instead expressly stated that they were subject to review for

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3. The Ninth Circuit dismissed the "branding" language as a mere "descriptive comment" from *Flynn*, but then was compelled to admit that it had, itself, employed *Flynn*'s "branding" language as an "alternative" to the "impermissible factor" test. App. 11a & n.2; *see Williams v. Woodford*, 384 F.3d 567, 588 (9th Cir. 2004). The Ninth Circuit seemingly views *Flynn*'s "branding" language as an alternative test when used by the Ninth Circuit, but an additional test when used by the California court. App. 11a & n.2. Federal courts have freely used *Flynn*'s "branding" language in this context. *See, e.g., Hill v. Ozmint*, 339 F.3d 187, 200 & n. 15 (4th Cir. 2003); *United States v. Olvera*, 30 F.3d 1195, 1197 (9th Cir. 1994); *Morgan v. Aispuro*, 946 F.2d 1462 (9th Cir. 1991); *United States v. Milner*, 962 F.2d 908, 915 (9th Cir. 1992); *see also Coy v. Iowa*, 487 U.S. 1012, 1034-35 (1988) (Blackmun, J., dissenting); *cf. United States v. Harris*, 703 F.2d 508, 512 (11th Cir. 1983) ("prison garb . . . clothes him with an unmistakable mark of guilt").

harmlessness. *Id.* at 2015-16 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)); *see also Estelle v. Williams*, 425 U.S. at 506-08 (suggesting inherently prejudicial courtroom practice subject to review for harmlessness, and citing circuit courts in accord). In the context of § 2254(d)(1) review, even if a federal court finds an unreasonable application of Supreme Court authority, it still must determine whether the constitutional error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also* App. 30a ("Under *Flynn* . . . it is possible to have a situation that is 'inherently prejudicial' but not '*so* inherently prejudicial as to pose an unacceptable threat to [a] defendant's right to a fair trial.'" (original emphasis)).

2. As Judge Bea observes in dissent, the Ninth Circuit erroneously treated the alleged error below as structural. App. 29a. The court stated that under *Estelle* and *Flynn*, a finding of inherent prejudice ends the inquiry and "requires reversal"; it never addressed harmlessness. App. 10a. The court seemingly conflates the principle that the inherent prejudice of a given courtroom practice establishes constitutional error, with the proposition that the inherent prejudice of that practice perforce establishes structural error. But whatever its misunderstanding, the Ninth Circuit's judgment is contrary to *Deck v. Missouri*, 125 S. Ct. 2015-16 and fails to demonstrate compliance with *Brecht v. Abrahamson*, 507 U.S. at 638.

Certiorari should be granted to correct the Ninth Circuit's decision that inherently prejudicial courtroom practices constitute structural error. Its holding, coupled with its announcement that it will rely on its own case authority to grant relief under § 2254(d)(1), are errors profoundly disturbing to the judicial processes of the States, particularly given the wide variety of courtroom practices, *e.g.*, shackling, jail clothing, and spectator conduct, that may be subject to review under the standard enunciated by the federal circuit court.

CONCLUSION

The petition for writ of certiorari should be granted

Dated: December 15, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

GREGORY A. OTT
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

GAO:cc
SF2005401614

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATHEW MUSLADIN, *Petitioner-Appellant,*	)	**No. 03-16653**
	)	**D. C. No.**
v.	)	**CV-00-01998-JL**
ANTHONY LAMARQUE, WARDEN, *Respondent-Appellee.*	)	**ORDER AND OPINION**

Appeal from the United States District Court
for the Northern District of California
James Larson, Magistrate, Presiding

Argued and Submitted
November 2, 2004—San Francisco, California

Filed October 21, 2005

Before: Stephen Reinhardt, David R. Thompson, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Reinhardt;
Dissent by Judge Thompson

COUNSEL

Barry J. Portman, Federal Public Defender, and David W. Fermino, Assistant Federal Public Defender, San Francisco, California, for the petitioner-appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Glenn R. Pruden, Deputy Attorney General, and Gregory A. Ott, Deputy Attorney General, San Francisco, California, for the respondent-appellee.

ORDER

The opinion and dissent filed on April 8, 2005, slip op. 4055, and appearing at 403 F.3d 1072 (9th Cir. 2005), is withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit. The clerk shall file the attached opinion and dissent in its place.

OPINION

REINHARDT, Circuit Judge:

At a murder trial in which the central question is whether the defendant acted in self-defense, are a defendant's constitutional rights violated when spectators are permitted to wear buttons depicting the deceased individual? We conclude that under clearly established Supreme Court law such a practice interferes with the right to a fair trial by an impartial jury free from outside influences.

Mathew Musladin appeals the district court's denial of his petition for a writ of habeas corpus. He contends that the buttons worn by the deceased individual's family members at his trial created an unreasonable risk of impermissible factors coming into play, and that the state court was objectively unreasonable in denying this claim both on direct appeal and in the post-conviction proceedings. In light of clearly established federal law set forth by the Supreme Court, and persuasive

authority from this court concerning the proper application of that law, we hold that the last-reasoned decision of the state court constituted an unreasonable application of Supreme Court law. Accordingly, we reverse the district court's denial of Musladin's petition and remand for issuance of the writ.

I. Factual Background and Procedural History

Musladin was charged in a California state court with first degree murder for the killing of Tom Studer, the fiancé of his estranged wife Pamela. On May 13, 1994, Musladin came to the house where Pamela, Studer, and Pamela's brother Michael Albaugh lived in order to pick up his son for a scheduled weekend visit. Pamela testified that she and Musladin had an argument, and that Musladin pushed her to the ground. According to Pamela, when Studer and Albaugh came out of the house to assist her, Musladin reached into his car to grab a gun and fired two shots at Studer, killing him. Musladin contends, however, that after Pamela fell to the ground, Studer and Albaugh appeared, holding a gun and a machete respectively, and threatened him. Musladin asserted that, after seeing the weapons, he shot in the general direction of Studer out of fear for his own life. Accordingly, at trial Musladin argued perfect and imperfect self-defense. There is no dispute that Musladin fired the shot that killed Studer, although experts for both sides agree that the fatal shot was the result of a ricochet rather than a direct hit. Under Musladin's theory of defense, there was no crime and, thus, no victim.

During the 14-day trial, Studer's family sat in the front row of the gallery. On each of those 14 days, at least three members of the family wore buttons on their shirts with the deceased's photograph on them. According to declarations submitted by the defendant, the buttons were several inches in diameter and "very noticeable." Furthermore, the family members were seated in the row directly behind the prosecution and in clear

view of the jury. Before opening statements, counsel for Musladin requested that the trial judge instruct the family members to refrain from wearing the buttons in court, out of fear that the button's expressive content would influence the jury and prejudice Musladin's defense. The trial judge denied the request. Musladin was convicted of first degree murder and three other related offenses.

Musladin exhausted the available state procedures both on direct review and on post-conviction relief. The California Court of Appeal on direct appeal held, citing *Holbrook v. Flynn*, 475 U.S. 560, 570-71 (1986), that: "While we consider the wearing of photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged, we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." Musladin then filed a petition for a writ of habeas corpus in the District Court for the Northern District of California. He alleged, among other things, that the state court unreasonably applied clearly-established federal law in determining that his right to a fair trial was not violated by the family members' wearing of the buttons depicting the deceased. The district court denied the petition and this appeal followed.

II. The AEDPA Standard

Musladin's petition for habeas corpus is governed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Therefore, we may not grant habeas relief to the defendant unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Because state courts often issue "postcard" denials that offer no rationale for their dispositions, we determine whether the state court unreasonably applied federal law by looking to the "last reasoned decision of the state

court as the basis of the state court's judgment." *Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002). In this case, we look to the opinion of the California Court of Appeal on direct appeal.

AEDPA limits the source of clearly-established federal law to Supreme Court cases. *See* 28 U.S.C. § 2254(d)(1). Nevertheless, we recognize that precedent from this court, or any other federal circuit court, has persuasive value in our effort to determine "whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and . . . what law is 'clearly established.'" *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000); *see also Robinson v. Ignacio*, 360 F.3d 1044, 1057 (9th Cir. 2004) ("When faced with a novel situation we may turn to our own precedent, as well as the decisions of other federal courts, in order to determine whether the state decision violates the general principles enunciated by the Supreme Court and is thus contrary to clearly established federal law."); *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003) ("[T]he objective reasonableness of a state court's application of Supreme Court precedent may be established by showing other circuits having similarly applied the precedent."); *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002) ("[T]o the extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." (internal quotation marks and citation omitted)); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 890 (3d Cir. 1999) ("[W]e do not believe federal habeas courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable.") (en banc).

III. Discussion

[1] "Due process requires that the accused receive a fair trial

by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). The Supreme Court has held that when the consequence of a courtroom practice is that an "unacceptable risk is presented of impermissible factors coming into play," there is "inherent prejudice" to a defendant's constitutional right to a fair trial and reversal is required. *Flynn*, 475 U.S. at 570. In order to determine whether Musladin is entitled to federal habeas relief, we must therefore assess whether the buttons depicting the deceased individual worn by spectators at the trial posed a risk of impermissible factors coming into play that is similar to those previously found to exist in other circumstances, such as in compelling a criminal defendant to wear prison garb and shackles before the jury, *see Estelle v. Williams*, 425 U.S. 501 (1976), and in permitting spectators at a rape trial to wear anti-rape buttons, *see Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990). Because we conclude that no significant difference exists between the circumstances of this case and the "unacceptable risks" found to exist in *Williams* and *Norris*, we hold that the state court unreasonably applied established Supreme Court law in denying Musladin relief.

a. Clearly Established Federal Law

The underlying federal law in this case — that certain practices attendant to the conduct of a trial can create such an "unacceptable risk of impermissible factors coming into play," as to be "inherently prejudicial" to a criminal defendant — was clearly established by the Supreme Court in *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). In *Williams*, the Court considered whether compelling a criminal defendant to appear at his jury trial dressed in prison clothing violated his right to a fair trial. *See Williams*, 425 U.S. at 503-06. The Court found that the compelled wearing of prison clothing constitutes a continuous impermissible reminder to the jury of the defendant's condition: an accused in custody who is unable to post bail. *Id.* at 505. The Court held that the

influence of prison clothing, and the message it conveys to the jurors, impairs a defendant's presumption of innocence. *See id.* at 503. Noting these and other concerns, the Court concluded that because "[t]he defendant's clothing is so likely to be a continuing influence throughout the trial . . . an unacceptable risk is presented of impermissible factors coming into play." *Id.* at 505.

In *Flynn*, the court reaffirmed its holding in *Williams* regarding the "inherent prejudice" of courtroom practices that create an "unacceptable risk of impermissible factors coming into play," but distinguished the case before it on the facts. The defendants in *Flynn* argued that the presence of four uniformed state troopers sitting in the front row directly behind them at trial led the jury to draw adverse inferences about them. *Flynn*, 475 U.S. at 563-64. The Court explained that there are certain "courtroom practices [that it] might find inherently prejudicial," but that the use of security officers to the extent involved did not fall into that category. *Id.* at 569. As the Court explained, the "inferences that a juror might reasonably draw from the officers' presence" in that case "need not be . . . that [the defendant] is particularly dangerous or culpable." *Id.* In distinguishing *Flynn* from *Williams*, the Court pointed out that the jury may not even have noticed that extra guards were being used in the trial, or most likely, drew no impermissible inference from their presence. The court stated, "[guards] are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm." *Id.* at 569. The law concerning the "inherently prejudicial" nature of courtroom practices which convey an impermissible message, however, remained unchanged and clear.

[2] This court's decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), has persuasive value in an assessment of the meaning of the federal law that was clearly-established by *Williams* and *Flynn* and whether the state court's application of

that law in the case before us is objectively unreasonable. Like the present case, *Norris* involved the application of the Supreme Court's "inherent prejudice" rule in assessing whether buttons worn by audience members during a trial created an "unacceptable risk of impermissible factor coming into play." *See Norris*, 918 F.2d at 831-32. In *Norris*, the defendant was facing a criminal charge of rape. During the trial, several women sat in the spectator's gallery wearing buttons that read "Women Against Rape." *Id.* at 829. We noted that at any given time in Norris's trial, approximately three women in the audience would be wearing the anti-rape buttons. *Id.* at 831. Faced with these facts, we applied *Williams* and concluded that "[j]ust as the compelled wearing of prison garb during trial can create an impermissible influence on the jury, throughout trial the buttons' message . . . constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." *Id.* at 831. As we explained, because of the button's obvious communicative purpose, its impermissible message was far more clear and direct than that deemed unlawful in *Williams*:

> Thus, though far more subtle than a direct accusation, the buttons' message was all the more dangerous precisely because it was not a formal accusation. Unlike the state's direct evidence, which could have been refuted by any manner of contrary testimony to be judged ultimately on the basis of each declarant's credibility, the buttons' informal accusation was not susceptible to traditional methods of refutation. Instead, the accusation stood unchallenged, lending credibility and weight to the state's case without being subject to the constitutional protections to which such evidence is ordinarily subjected.

Id. at 833.

Our reliance on *Norris* is appropriate for another reason: the

last reasoned state court opinion identified *Norris* as setting forth the operative law as announced by the Supreme Court, and the state court sought to apply *Norris* when reaching its determination. Indeed, the state court's unreasonable application of federal law lies in its misapplication of the *Williams* test, as it was explained in *Norris*, to the facts of this case.

The state court's decision to apply *Norris*, and ours to afford it persuasive weight when determining the federal law as established by *Williams*, are particularly significant in light of the striking factual similarities between *Norris* and the present case. *See Richardson v. Bowersox*, 188 F.3d 973, 978 (8th Cir. 1999) ("In determining whether a state court's decision involved an unreasonable application of clearly established federal law, it is appropriate to refer to decisions of the inferior federal courts in factually similar cases.").

b. Unreasonable Application of The Law

Although the state court identified the correct federal law to apply in adjudicating Musladin's claim, citing *Williams* for the controlling principle, and properly looking to our decision in *Norris* as a persuasive application of that federal law in a factually similar case, the state court was objectively unreasonable both in its ultimate conclusion and in the rationale it employed in denying Musladin's appeal. The California Court of Appeal justified its rejection of Musladin's claim as follows:

> [i]n contrast to the buttons in *Norris*, the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims

> in a courtroom to be an "impermissible factor coming into play," the practice of which should be discouraged, we do not believe the buttons in this case branded defendant "with an unmistakable mark of guilt" in the eyes of the jurors.

People v. Musladin, No. H015159 at 21-22 (Cal. Ct. App. Dec. 9, 1997) (unpublished decision) (citing *Flynn*, 475 U.S. at 570-71).

[3] By disposing of Musladin's claim in the above manner, the state court unreasonably applied federal law by imposing an additional and unduly burdensome requirement — demanding that the challenged practice cause the "brand[ing]" of the defendant with an "unmistakable mark of guilty" — even though the *Williams* test for finding "inherent prejudice" had already been met. The court specifically found "the wearing of photographs of victims in a courtroom *to be* an 'impermissible factor coming into play'" (emphasis added). Under Williams and Flynn, that finding, in itself establishes "inherent prejudice" and requires reversal.

Williams and *Flynn* cannot be distinguished. In the case before us, the state court found not only that an "unreasonable risk" existed that an impermissible factor *would* come into play, but that an impermissible factor actually *had* come into play. Nevertheless, after setting forth this finding, the state court added that, although the practice of wearing such buttons "should be discouraged," Musladin was not entitled to relief because "the buttons in this case [did not] brand[ ] defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." The state court was unreasonable in imposing this additional requirement after it had concluded that the "inherent prejudice" elements had already been fully established.

The Supreme Court announced in *Williams* and *Flynn* that following a finding of an unacceptable risk of impermissible

factors coming into play, no further showing is necessary because the practice is then deemed "inherently prejudicial." Here, the state court flouted that rule: it required that the challenged practice not only constitute an unacceptable risk of an impermissible factor coming into play but also that it "brand" the defendant with an "unmistakable mark of guilt." This additional test imposes too high and too unreasonable a burden on defendants and is contrary to established Supreme Court law. *See Benn v. Lambert*, 283 F.3d 1040, 1051 n.5 (9th Cir. 2002).[1]

[4] We note that the "branding" with an "unmistakable mark of guilt" language employed in *Flynn* constituted only a descriptive comment. *See Flynn*, 475 U.S. at 571 (quoting *Williams*, 425 U.S. at 518 (Brennan, J., dissenting)).[2] Both

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[1]This is not to say that a showing of actual prejudice has no role in a *Flynn* challenge. As we held in *Norris*, reversal is required if a defendant can prove *either* actual *or* inherent prejudice. *See Norris*, 918 F.2d at 828; *accord Woods*, 923 F.2d at 1457; *see also United States v. Halliburton*, 870 F.2d 557, 560 (9th Cir. 1989) ("If we find that the jurors' brief view of Halliburton in handcuffs was not inherently prejudicial, we must then determine whether appellant has carried his burden of affirmatively showing actual prejudice.").

[2]Justice Brennan's dissent in *Williams* was the first time a member of the Court employed the "branding" language. Justice Brennan explained that regardless of whether prison clothing was compelled or not, the wearing of those clothes adversely affects a defendant's presumption of innocence, because, among other things, the clothing "surely *tends* to brand him in the eyes of the jury with an unmistakable mark of guilt." *Williams*, 425 U.S. at 518 (Brennan, J., dissenting) (emphasis added). When it was repeated in *Flynn*, the majority had already dismissed the defendant's challenge, and was simply noting in the alternative that "[e]ven had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand respondent in their eyes 'with an unmistakable mark of guilt.'" *Flynn*, 475 U.S. at 571 (quoting *Williams*, 425 U.S. at 518 (Brennan, J., dissenting)). *Flynn* never stated that in order to prevail the defendant was required to meet that standard. Rather, it may simply have been refuting the defendant's contention that the challenged practice had the described effect.

Williams and *Flynn* are clear as to the legal standard, and neither suggested that "branding" was necessary. Indeed, under the state court's interpretation, the holding in *Williams* would not survive its own test. The *Williams* Court never found, or even implied, that the compelled donning of prison clothing would "brand[the] defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." Rather, the court's concern was directed purely at the clothes' role as a "constant reminder of the accused's condition" — a "continuing influence throughout the trial," principally because the requirement that defendants wear prison clothes "operates usually against only those who cannot post bail prior to trial." *Williams*, 425 U.S. at 504-06. At most, the *Williams* Court found that the shackling and prison clothes were "unmistakable indications of the need to separate a defendant from the community at large," not that they would "brand" the defendant with an "unmistakable mark of guilt." *Flynn*, 475 U.S. at 569, 571. Although a practice that brands a defendant as guilty would surely be sufficient to demonstrate "inherent prejudice" and require reversal, branding is not a necessary element of establishing such prejudice. The state court's imposition of the additional "branding" requirement was contrary to clearly established federal law and constituted an unreasonable application of that law.[3]

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[3]We have consistently granted relief in this circuit on *William-Flynn* grounds without requiring the defendant to show that the challenged practice "branded" him with "an unmistakable mark of guilt." *See, e.g., Norris*, 918 F.2d at 831; *United States v. Olvera*, 30 F.3d 1195, 1198 (9th Cir. 1994) ("We conclude that [the challenged practice] posed an unacceptably high risk of influencing the jury's judgment in a manner that undermined the presumption of innocence."). Although we have found that proving a mark of unmistakable guilt is *sufficient* to establish prejudice, we have never held that it is *necessary*. To the contrary, we have noted that it may serve an alternative to the basic test, which remains the traditional standard by which we determine the existence of inherent prejudice. *See Williams v. Woodford*, 384 F.3d 567, 588 (9th Cir 2004) ("The Supreme Court has said that security measures at trial are inherently prejudicial when they 'tend[ ] to brand [the defendant] in [the jurors'] eyes with an unmistakable mark of guilt,' *or* when

[5] Moreover, the finding by the California Court of Appeal goes beyond the finding that was held to require reversal in *Norris*. The state court attempted to distinguish *Norris*, but *Norris* simply cannot reasonably be distinguished. The message conveyed in the present case is even stronger and more prejudicial than the one conveyed in *Norris*. The state court unreasonably justified its conclusion by stating that, when compared to the buttons worn by spectators in *Norris*, the "message conveyed by the Studer family wearing buttons is less than clear." This is simply not the case. Just as we held that the message sent by the anti-rape buttons was substantially more direct and clear than the message conveyed by the prison clothing in *Williams*, *see Norris*, 918 F.2d at 831, the message conveyed by the buttons depicting Studer in the case before us is substantially more direct and clear than that of the anti-rape buttons in *Norris*. In *Norris*, the buttons expressed the wearer's position against rape but did not specify the defendant or the victim. In this case, the buttons actually depicted the individual that the defendant was charged with murdering and represented him as the innocent party, or the victim. Here, the direct link between the buttons, the spectators wearing the buttons, the defendant, and the crime that the defendant allegedly committed was clear and unmistakable. The primary issue at Musladin's trial was whether it was the defendant or the deceased individual who was the aggressor. The buttons essentially "argue" that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and, thus, the perpetrator of a criminal act.

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they create 'an unacceptable risk . . . of impermissible factors coming into play.'" (emphasis added) (internal citations omitted)). Thus, branding may be an alternative means of establishing a violation, but it is not an additional requirement to be imposed after the violation has already been established under the traditional *Williams-Flynn* standard.

[6] The California court's belief that buttons depicting the deceased individual were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member" is even more incorrect as a matter of law than the view that interpreting the "Woman against Rape" buttons in *Norris* served no purpose other than women announcing a general statement against rape or expressing solidarity with, or support for, the rape victim in Norris's case.[4] We did not excuse the wearing of the buttons on that ground in *Norris*, and it was objectively unreasonable in light of *Norris* for the state court to do so here. *See Norris*, 918 F.2d at 831. In both *Norris* and the case before us, the law requires the courts to look beyond the general sentiment a button reflects and to determine the specific message that the button conveys in light of the particular facts and issues before the jury. Doing so here, a reasonable jurist would be compelled to conclude that the buttons worn by Studer's family members conveyed the message that the defendant was guilty, just as the buttons worn by spectators in *Norris* did in that case.

IV. Conclusion

[7] In finding the wearing of buttons depicting the deceased

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[4]Even if we concluded that a showing of solidarity was the primary effect of the buttons in *Norris* or the buttons worn by the deceased individual's family in this case, such a showing would not be inconsistent with the conveying of a message about the defendant or his guilt. The Eleventh Circuit considered a similar question when a defendant, accused of killing a prison guard, challenged the presence of uniformed officers in the audience at his trial. In a post-*Flynn* decision, the Eleventh Circuit held that the officers' act of showing solidarity was inherently prejudicial to the defendant and granted the writ: "The officers in this case were there for one reason: they hoped to show solidarity with the killed correctional officer. In part, it appears that they wanted to communicate a message to the jury . . . [that they] wanted a conviction followed by the imposition of the death penalty. The jury could not help but receive the message." *Woods v. Dugger*, 923 F.2d 1454, 1459-60 (11th Cir. 1991).

individual to be an "impermissible factor coming into play," the state court reached the point at which the Supreme Court "went no further and concluded that the practice [at issue wa]s unconstitutional." *Flynn*, 475 U.S. at 568. Instead of granting relief, however, the state court, disregarding the fact that the central question was one of self-defense, unreasonably stated that the message conveyed through the wearing of the buttons in this case was not as clear as that conveyed by the anti-rape buttons in *Norris*. The state court then unreasonably held that "branding" the defendant with "an unmistakable mark of guilt" is necessary to grant relief even though it had already found that "impermissible factors" had come into play before the jury. The state court did not simply engage in an incorrect application of Supreme Court law. Rather, its application of that law was contrary to the Court's established rule of law and was objectively unreasonable. Accordingly, we reverse the district court's denial of Musladin's petition for habeas corpus and remand for issuance of the writ. Musladin shall be released unless the state elects to re-try him within 90 days of the issuance of the mandate.

Reversed and Remanded.

THOMPSON, Senior Circuit Judge, dissenting:

I respectfully dissent.

A further statement of the facts seems appropriate. The petitioner, Musladin, and his wife, Pam, were married but separated at the time of the crimes of which Musladin was convicted. Pam was living at her mother's house with her brother Michael Albaugh, her fiancé Tom Studer, and Garrick Musladin, her then three-year-old son by Musladin. On the day of the shooting, Musladin went to the house to pick up Garrick for a scheduled weekend visitation.

The prosecutor presented evidence that an argument ensued between Pam and Musladin in the driveway, during which Musladin pushed Pam to the ground and reached for a gun in his car. Albaugh, standing in the driveway, yelled, "He's got a gun." Pam and Studer ran up the driveway. Musladin fired the gun at Pam and Studer, hitting Studer in the back of the shoulder. Pam ran into the house and out the back door. Studer fell to the ground and attempted to crawl underneath a truck in the garage. Musladin entered the garage and fired a second shot which ricocheted into Studer's head, killing him.

Musladin presented a different version of these events. He admitted shooting at Studer and killing him, but claimed perfect and imperfect self-defense. He testified that he believed Albaugh was carrying a machete and Studer a gun, and that he fired both shots out of fear for his life. After firing the shots, he got in his car and drove away.

Musladin was tried and convicted of first-degree murder of Studer and attempted murder of Pam.

I disagree with the majority's reliance upon our decision in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), for the application in this case of the rule of *Estelle v. Williams*, 452 U.S. 501 (1976). In *Williams*, the Court determined it to have been a violation of the right to a fair trial for the state to have compelled the defendant to wear prison clothing during his trial. *Id.* at 505. The Court held the prison clothing impaired the defendant's presumption of innocence. *Id.* In the present case, the state court permitted relatives of the deceased victim to wear buttons in the courtroom. The buttons disclosed only the deceased victim's picture, nothing else, and had nothing to do with the defendant.

Our *Norris* case was a case involving three women who wore

buttons in the courtroom during the defendant's trial for rape, but that case is not controlling here. The buttons in *Norris* were two and one-half inches in diameter and bore the words "Women Against Rape." *Norris*, 918 F.2d at 830. "[T]he word 'rape' [was] underlined with a broad red stroke." *Id.* We stated: "[T]he buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." *Id.* at 831.

Here, the buttons were three to four inches in diameter and, except for the deceased victim's picture, there was nothing else on them. The buttons conveyed no "message." As the state appellate court stated, "The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member."

Further, it is difficult to distinguish this case from the routine situation of a deceased victim's family members, without buttons, sitting as a group in a courtroom during a trial. Jurors in such a trial surely would recognize the group for what it is. The addition of buttons worn by them showing only the victim's photograph would add little if anything to any possible risk of impermissibly prejudicing the jury.

Although the state appellate court in the present case commented that it "consider[ed] the wearing of the photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged," quoting the "impermissible factor" language from *Williams*, 425 U.S. at 505 (which the Supreme Court also quoted in *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)), the state court's "impermissible factor" comment is most reasonably understood as reflecting that court's view that buttons bearing a victim's photograph should not be worn in a courtroom. The comment

did not change the buttons or make them something they were not. Moreover, the state court's additional comment that the buttons did not "brand[ ] defendant 'with an unmistakable mark of guilt'" is most reasonably understood as an explanation that the buttons were not "so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial." *Holbrook*, 475 U.S. at 572.

In sum, I do not believe the decision by the California Court of Appeal was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *See* 28 U.S.C. § 2254(d)(1). The state court's decision was not "contrary to" any such federal law, because the state court did not "'appl[y] a rule that contradicts the governing law set forth in [Supreme Court] cases,'" nor did the state court "'confront[ ] a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrive[ ] at a result different from [Supreme Court] precedent.'" *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

Nor does the state court's decision abridge the "unreasonable application" clause of 28 U.S.C. § 2254(d)(1). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous. The state court's application of clearly established law must be objectively unreasonable." *Lockyer*, 538 U.S. at 75 (internal citations omitted). Here, even if erroneous (which it was not), the California Court of Appeal's decision was not "objectively unreasonable."

The petitioner also asserts a number of other claims that he argues merit habeas relief. I would reject those claims as well, and thus would affirm the district court.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATHEW MUSLADIN,	)	**No. 03-16653**
Petitioner-Appellant,	)	**D.C. No.**
	)	**CV-00-01998-JL**
v.	)	**Northern District**
	)	**of California,**
ANTHONY LAMARQUE, WARDEN,	)	**San Francisco**
Respondent-Appellee.	)	**ORDER**
	)	

Filed October 21, 2005

Before: Stephen Reinhardt, David R. Thompson, and Marsha S. Berzon, Circuit Judges.

Order;
Dissent by Judge Kleinfeld;
Dissent by Judge Bea

ORDER

The petition for panel rehearing is DENIED.

The full court was advised of the suggestion for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. The request for rehearing en banc is DENIED.

KLEINFELD, Circuit Judge, with whom KOZINSKI, O'SCANNLAIN, TALLMAN, BYBEE, CALLAHAN, and BEA, Circuit Judges, join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc. We have effectively erased a statutory provision designed to restrict the power of the lower federal courts to overturn fully reviewed state court criminal convictions. And we have sharpened a serious circuit split.

Musladin was convicted of murder, and his conviction was upheld through direct and collateral review in the California courts. The California Court of Appeal carefully and reasonably applied the relevant precedents of the United States Supreme Court, but arguably deviated from the implications of a Ninth Circuit precedent.

In 1996, Congress adopted the Antiterrorism and Effective Death Penalty Act (AEDPA), amending the standard that federal courts must apply to state criminal convictions in habeas cases. The statute as amended says that we may grant a habeas petition if and only if the last reasoned state court decision "was contrary to, or involved an unreasonable application of, **clearly established** Federal law, **as determined by the Supreme Court of the United States**."[1] Our decision in this case has the practical effect of erasing the statutory phrase "as determined by the Supreme Court of the United States." Our tools for statutory construction are many,[2] but they do not include an eraser. Yet here we go, erasing the "clearly established" phrase and

[1]28 U.S.C. § 2254(d)(1) (emphasis added).

[2]*See* 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction Part V, subpart A (6th ed. 2000).

expanding the "as determined" phrase. The statute in nine states now says, as a practical matter, "contrary to, or involved an unreasonable application of, ~~clearly established~~ Federal law, as determined by the Supreme Court of the United States, **giving 'persuasive weight' to Ninth Circuit decisions that have applied Supreme Court decisions.**" We do not have that legislative authority.

The facts of this case and of the controlling precedents show just how clear our mistake is. Musladin, embroiled in a custody dispute with his estranged wife, murdered her new fiancé. At his trial, three members of the fiancé's family sat in the spectator section of the courtroom wearing buttons with his picture on them. The buttons were two-to-four inch pictures of the victim but had no words. Musladin argued in his state court appeal and petition for review that the buttons denied him due process of law by eroding his presumption of innocence.

The California Court of Appeal concluded that the buttons contained no express message and were unlikely to signify "anything other than the normal grief occasioned by the loss of a family member."[3] The California Court carefully examined *Estelle v. Williams*[4] and *Holbrook v. Flynn*[5] (the relevant Supreme Court decisions on) and Ninth Circuit cases. Though the Court of Appeal noted that button wearing should be "discouraged," it held that the buttons did not amount to a denial of due process because they did not brand Musladin "with an unmistakable mark of guilt."[6]

The statute is quite clear that our task on review of Musladin's petition for a writ of habeas corpus is not to

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[3]*People v. Musladin*, No. H015159 at 21 (Cal. Ct. App. 1997).

[4]*Estelle v. Williams*, 425 U.S. 501 (1976).

[5]*Holbrook v. Flynn*, 475 U.S. 560 (1986).

[6]*People v. Musladin*, No. H015159 at 22.

examine the California Court of Appeal decision as though we were a higher California court. Rather, we exercise a much more limited and deferential review to determine whether the California Court of Appeal acted contrary to "clearly established . . . Supreme Court" precedent or "unreasonabl[y]" applied it.[7] The only question for us is whether there is any Supreme Court authority that holds that silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence. The answer is that there is no such case. That should be the end of our inquiry.

The Supreme Court held in *Estelle v. Williams* that forcing a defendant to wear prison clothes at trial is "inherently prejudicial" and denies due process.[8] It held in *Holbrook v. Flynn* that the presence of several armed uniformed officers in the spectators' row directly behind the prisoner is not inherently prejudicial.[9] Neither of these cases holds that a spectator's symbol of affiliation or even opinion denies due process to a defendant.

Dressing the defendant in "prison garb," the *Estelle* problem,[10] is not analogous to spectators wearing buttons. First, prison garb is an unambiguous statement that the defendant is already a prisoner. Second, it is a communication to the jury of the government's determination—not a non-governmental spectator's—that the defendant belongs in jail. The buttons, by contrast, are ambiguous. They may mean "we really want this defendant punished because we care a lot about his victim," or they may merely mean "we care a lot about the victim," without an implication that the defendant is the proper person to be

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[7] 28 U.S.C. § 2254(d)(1).

[8] *Estelle*, 425 U.S. at 530 n.10.

[9] *Flynn*, 475 U.S. at 568-69.

[10] *Estelle*, 425 U.S. at 503.

punished. Even more important, the spectators' buttons do not imply any determination by the government. Even if the buttons did imply that the spectators wanted the defendant punished, that would not be as corrosive of the presumption of innocence as the government saying "this defendant belongs in jail and he is already there because of our determination." Unlike the spectators' buttons in this case, the prison garb in *Estelle* detracted from the presumption of innocence and from the defendant's dignity in the courtroom.[11]

The presence of the armed officers in the spectator section in *Flynn* more closely resembles the facts in our case than does the prison garb in *Estelle*. Both involve what the jury might perceive as communications from the spectators' section. But the Supreme Court held that the presence of the armed officers did *not* deprive the defendant of due process by corroding the presumption of innocence. And the armed officers were far more likely to do so than spectators not associated with the government because the officers represented the government and might have communicated its judgment that the defendant was dangerous. The Supreme Court held that the armed officers did *not* deny due process because of the "wider range of inferences that a juror might reasonably draw from the officers' presence."[12] The courtroom cannot be totally free of indications that the state thinks the defendant is guilty, for "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance."[13] With these two Supreme Court cases as bookends—showing what denies due process and

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[11] *See id.* at 518 (Brennan, J., dissenting) ("Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt.").

[12] *Flynn*, 475 U.S. at 569.

[13] *Id.* at 567.

what does not—the California courts were well within the bounds of reasonable interpretation in determining that this case is more like *Flynn*. The buttons with a picture of the dead fiancé did not say or obviously imply that the defendant killed him, just that the spectators wearing them cared about him.

So how did the panel majority manage to reach a different result in the face of Supreme Court decisions plainly leaving room for the California courts' conclusion and a statute limiting us to Supreme Court decisions? The panel extended a *Ninth Circuit* case, not a *Supreme Court* case, *Norris v. Risley*.[14] But the statute says we cannot do that, with the express restriction "**as determined by the Supreme Court of the United States**."[15] The panel evades that restriction by holding that we give "persuasive weight" to Ninth Circuit cases when determining what is "clearly established Federal law, as determined by the Supreme Court." The panel's proposition means that we will grant writs based on precedents *other than* those of the Supreme Court. Ergo, the statutory restriction on our power is erased.

We held in *Norris*—before AEDPA—that the writ should be granted where several female spectators wore "Women Against Rape" buttons in the presence of jurors in "elevators, in the courtroom, on their way to and from the courtroom," and while "the women served refreshments outside the courtroom on behalf of the state."[16] California could properly decide the case at bar by distinguishing *Norris*, disagreeing with *Norris*, or in complete ignorance of *Norris*. Under AEDPA's restriction to Supreme Court decisions, we are obligated to deny the writ so long as the California decision was not contrary to or an unreasonable application of *Estelle* and *Flynn*. We cannot

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[14]*Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990).

[15]28 U.S.C. § 2254(d)(1) (emphasis added).

[16]*Norris*, 918 F.2d at 829.

legitimately require the California courts to follow Ninth Circuit decisions on pain of our letting their prisoners out onto the street.

At least four of our sister circuits have expressly repudiated the error our panel has made. The Sixth Circuit, in *Mitzel v. Tate*, held that "[w]e may not look to the decisions of our circuit, or other courts of appeals, when 'deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.'"[17] The Tenth Circuit in *Welch v. City of Pratt* held AEDPA "restricts the source of clearly established law to [the Supreme] Court's jurisprudence" and federal courts are therefore "no longer permitted to apply our own jurisprudence."[18] The Seventh Circuit likewise determined that "[f]ederal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court case-law."[19]

The Fourth Circuit has also held that habeas relief may be granted only if "the state court decision is contrary to, or an unreasonable application of Supreme Court jurisprudence, and not circuit court precedent," so "any independent opinions we offer on the merits of the constitutional claims will have no determinative effect in the case before us, nor any precedential effect for state courts in future cases. At best, it constitutes a body of constitutional dicta."[20] The Fourth Circuit expressly rejects the notion that the lower federal courts need to provide "guidance" to the state courts on how to read the Supreme Court opinions. There is

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[17]*Mitzel v. Tate*, 267 F.3d 524, 531 (6th Cir. 2001) (quoting *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998)).

[18]*Welch v. City of Pratt, Kansas*, 214 F.3d 1219, 1222 (10th Cir. 2000) (internal citations and quotations omitted).

[19]*Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir. 1996).

[20]*Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (en banc).

> no reason to presume that state courts are in need of our guidance in interpreting and applying the controlling Supreme Court precedents. Our charge under the statute is only to determine whether the state court's adjudication of the claims before it was a reasonable one in light of the controlling Supreme Court law.[21]

Arguably our panel did not create the circuit split *ex nihilo*. The panel notes that the Eighth Circuit in *Williams v. Bowersox*[22] held that the "diversity of opinion" among federal courts on a particular issue suggested that the state court did not unreasonably apply Supreme Court precedent.[23] But saying that the state court decision is *not* unreasonable because some federal courts have reached similar conclusions is not at all the same as saying that the state court decision *is* unreasonable because a circuit court has reached a contrary conclusion. The First Circuit in *Ouber v. Guarino*[24] and the Third Circuit in *Matteo v. Superintendent*[25] come much closer to supporting the panel's decision, but our panel is unique in how boldly it has flown in the face of the statutory restriction to Supreme Court decisions.

Those of us who have actually tried cases to juries have frequently observed how spectators communicate their feelings. This communication is an unavoidable consequence of the Constitutional guarantee of "public trial."[26] Sometimes there is a wall of brown or blue in the spectators' section, displaying that state or municipal police care a great deal about the case. Sometimes the courtroom is full of Hells Angels colors,

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[21] *Id.* at 162.

[22] *Williams v. Bowersox*, 340 F.3d 667 (8th Cir. 2003).

[23] *Id.* at 672.

[24] *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002).

[25] *Matteo v. Superintendent*, 171 F.3d 877, 889-90 (3rd Cir. 1999).

[26] U.S. CONST. amend. VI.

signifying a concern for their brother in the defendant's chair. The local rape support center volunteers may crowd into the seats behind the prosecutor in a rape trial while the victim sits silently looking at the jurors through the entire trial. Defense lawyers round up family members to show support for the defendant by sitting behind the defense table.

There is nothing wrong with the jury knowing that people care about the case and the parties. Typically, the spectators arrange themselves like wedding guests choosing the bride's side or the groom's side, with those who favor a party sitting behind the lawyer for that side. In a public trial, the jury can always see that a lot of people care about one side or the other, or that no one cares except the parties and lawyers. Good lawyers often use this to their advantage, and good judges exercise prudence to avoid situations that might intimidate or prejudice the jury. Perhaps, as the California Court of Appeal implied, the trial judge in this case should have told the family members to remove their buttons. T-shirts with pictures of the victim would be difficult, but buttons are easy. There is no legitimate way for judges to prevent spectators in a public trial from showing that they care about the case and support one side or the other, even if only by where they sit and who they look at with sympathy or hostility. Public concern and public sympathy for one side or the other are part of what it means for a trial to be "public."

The panel's error is symptomatic of a deeper problem than its misapplication of Supreme Court precedent to spectators' photo buttons. Few things incumbent on powerful government officials are more fundamental than their duty to comply with the legal limitations on their power. Our panel has arrogated to our court power that we do not legitimately possess.

State judges take the same oath to uphold the Constitution that we do and perform the same work we do, construing

constitutional provisions and applying them to the facts before them. We do not sit as a state appellate court. One problem they sometimes have is deciding what to do about lower federal court decisions. Obviously they have to follow United States Supreme Court decisions, and they construe them as routinely as we do. Obviously they do not have to follow federal decisions on questions of state law.[27] Not quite as obviously, but just as true, state courts understand that they are free to act contrary to circuit court holdings on questions of federal law.[28] Lower courts must follow the law laid down by higher courts. But we are not a higher court than the Supreme Court of California or the California Court of Appeal, or for that matter, California traffic courts. We are in a different judicial hierarchy.

Our panel's error creates uncertainty and inconsistency for the nine state court systems and nearly 20% of our nation's population within the Ninth Circuit. Must they follow our decisions when they think *our* decisions are contrary to or unreasonable applications of Supreme Court precedent? The statute tells them one thing, we tell them another, and the briefs they get will tell them both. Under the plain statutory language, state courts are free to ignore our decisions. But under the panel's decision, they must follow them. We have effectively

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[27] *See generally* 20 AM. JUR. 2D Courts § 225 (1965) (noting that state courts free to ignore a federal ruling on a state law); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 80 (1938) (holding that federal courts are bound by state interpretations of state law); *Collier v. Bayer*, 408 F.3d 1279, 1283 n.4 (9th Cir. 2005) ("Federal courts of appeal[s] may not review state courts' interpretations of state law.").

[28] *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997); *see also Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring) ("In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *People v. Williams*, 16 Cal.4th 153, 190 (1997) (recognizing that decisions of lower federal courts interpreting federal law are not binding on state courts).

turned ourselves into the supreme court of the nine states in our circuit. I therefore dissent.

BEA, Circuit Judge, with whom Circuit Judges KOZINSKI, O'SCANNLAIN, and KLEINFELD join, dissenting from the denial of rehearing en banc:

I join Judge Kleinfeld's dissent from the denial of rehearing en banc. I write separately to underscore that it was not an "unreasonable application of clearly established federal law" for the California Court of Appeal to deny habeas relief notwithstanding its determination that the wearing of victims' photographs in a courtroom constitutes an "impermissible factor coming into play."

The panel opinion suggests that, once the California Court of Appeal "specifically found 'the wearing of photographs of victims in a courtroom *to be* an "impermissible factor coming into play,"'" Musladin's conviction could not stand. *See Musladin v. LaMarque*, ___ F.3d ___, ___ (9th Cir. 2005) (panel's emphasis). The rationale offered in support of this conclusion is that, "[u]nder *Williams* and *Flynn*," the finding of an impermissible factor coming into play "in itself establishes 'inherent prejudice' and requires reversal." *Id.* The panel opinion misconstrues *Williams* and *Flynn*. In *Williams*, the Court established that putting a defendant on trial in prison garb is constitutional error of the variety amenable to harmless-error analysis. *See Williams*, 425 U.S. at 507-09 (adopting the position of the Fifth Circuit that "the harmless-error doctrine is applicable to this line of cases"); Charles Alan Wright et al., *Federal Practice and Procedure* § 855, at 477 & n.8 (3d ed. 2004). When the Court in *Flynn* "reaffirmed its holding in *Williams*," *see Musladin*, ___ F.3d at ___, it did not, of course, transform "courtroom arrangements challenged as inherently

prejudicial" into structural errors, *Flynn*, 475 U.S. at 570. Rather, *Flynn* suggested that, to obtain a conviction's reversal, a defendant must show "actual prejudice" even after successfully demonstrating that the challenged courtroom arrangement was "inherently prejudicial." *See id.* at 572 ("[I]f the challenged practice is not found inherently prejudicial *and* if the defendant fails to show actual prejudice, the inquiry is over." (emphasis added)). Under *Flynn*, in other words, it is possible to have a situation that is "inherently prejudicial" but not "*so* inherently prejudicial as to pose an unacceptable threat to [a] defendant's right to a fair trial." *Id.* (emphasis added).

Accordingly, it was a reasonable application of Supreme Court precedent for the California Court of Appeal to determine that, although in its view the wearing of victims' photographs in a courtroom is inherently prejudicial, the button-wearing in this case did not actually deprive Musladin of his right to a fair trial.

Filed 5/14/03

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MATTHEW MUSLADIN,	**NO. C 00-1998 JL**
Petitioner,	
	ORDER DENYING
v.	**WRIT OF HABEAS**
	CORPUS
ANTHONY LAMARQUE, Warden,	
Respondent.	

INTRODUCTION

The petition of Mathew Musladin ("Petitioner") for writ of habeas corpus was fully briefed on August 20, 2001. The Attorney for Petitioner is Assistant Federal Public Defender David Fermino. Attorney for Respondent is Deputy Attorney General Gregory A. Ott. The matter having been fully considered and good cause appearing, it is hereby ordered that the petition is denied.

I. PROCEDURAL BACKGROUND AND STANDARD OF REVIEW

Musladin filed this petition on June 5, 2000 pursuant to Title 28 U.S.C. § 2254(a). Both parties consented to proceed before a United States Magistrate Judge. *See* 28 U.S.C. § 636(c). Attorney Cliff Gardner withdrew as counsel on June 27, 2002. The court appointed Assistant Federal Public Defender David Fermino on August 20, 2002. The petition is before the court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.

Review of Petitioner's claim is subject to the provisions of the Anti-Terrorism and Effective Death Penalty Act. Under AEDPA, a federal court may reverse a state court's decision

denying relief only if that decision is "contrary to, or involves an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2554(d)(1). This Court may rely only on constitutional principles that have been established in this District or Circuit that have been sufficiently addressed by the United States Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 381 (2000).

II. FACTUAL BACKGROUND

Petitioner and Pam Musladin were married but separated at the time of the homicide of which Petitioner was convicted. Pam was living at her mother's house with her brother Michael Albaugh, her boyfriend Tom Studer, and Garrick Musladin, her four year old son by Petitioner. On the day of the subject incident, Petitioner was at Pam's home to pick up their son for his scheduled weekend visitation. The remaining facts are in dispute.

Pam Musladin testified as follows: she and Petitioner were having a discussion in the driveway of the house. Petitioner became angry and pushed her to the ground. Michael Albaugh and Tom Studer came out of the house. Mr. Albaugh attempted to calm Petitioner while Mr. Studer helped Pam to her feet. Petitioner then reached under the seat of his car. When Mr. Albaugh yelled, "He's got a gun," Pam and Mr. Studer began to run up the driveway. Petitioner fired his weapon towards them and struck Studer in the back of the shoulder. Studer fell to the ground and attempted to climb underneath the truck in the garage. Petitioner entered the garage and fired a second shot into Studer's head.

Petitioner presented a different version of these events. He said Michael Albaugh and Tom Studer left the house and entered the garage. He became fearful when Albaugh and Studer threatened him from inside the garage. Although Petitioner stated he could not see their faces because of the poor lighting, he believed that Albaugh was carrying a machete and Studer a gun. Petitioner testified that Albaugh came towards

him. Petitioner then turned his attention to Pam, who was yelling for someone to remove her child from the front yard.

Petitioner then looked back into the garage, where he thought Studer was still holding the gun. Petitioner claimed that he fired into the garage out of fear for his own life. Petitioner testified that he believed he had struck Studer, the intended target, with the first bullet. Petitioner then decided to move up the driveway closer to the garage. After hearing a noise, Petitioner fired his gun a second time at an unidentified target.

III. TRIAL COURT PROCEEDINGS

On December 27, 1994, the Santa Clara County District Attorney filed a four count information: one count of murder in violation of California Penal Code section 187, including a personal firearm use allegation; one count of attempted murder in violation of sections 187 and 664, also with a personal use allegation; one count of burglary in violation of section 459; and one count of assault in violation of section 245(a)(2), also with a personal use allegation. Petitioner pled not guilty to all charges.

Petitioner was tried by a jury and convicted of first degree murder on November 1, 1995. The trial court sentenced him to a 25-year-to-life term on count one, adding a four year middle term for the use allegation. The court added a three year term for the assault count and a concurrent term for the attempted murder conviction. The court stayed punishment on count three, as well as the use allegations in counts two and four.

Petitioner timely filed a notice of appeal. On December 9, 1997, the California State Court of Appeal affirmed his conviction. On March 23, 1998, the California Supreme Court denied his timely petition for review. The time to petition for certiorari from the United States Supreme Court expired on June 21, 1999. Petitioner filed a petition for writ of habeas corpus in state court on June 16, 1999, which was denied on June 2, 2000. He filed this petition for habeas review in federal court on June 5, 2000.

This court issued an Order to Show Cause on October 19, 2000, instructing the Attorney General's Office to respond to the petition. An Answer was filed on May 14, 2001. Petitioner filed a Traverse to the Answer on August 16, 2001.

IV. DISCUSSION

Petitioner asserts six separate errors by his counsel and the trial court, which he contends requires the reversal of his conviction. First, he alleges three errors by his attorney, resulting in ineffective assistance of counsel: (1) failure to present testimony that the victim had previously threatened to kill Petitioner, (2) failure to call an expert witness to testify that the entry path of the first bullet was not inconsistent with a theory of self-defense, and (3) failure to request a limiting instruction on the double hearsay testimony of Garrick Musladin, who was four years old at the time of the homicide.

Petitioner next alleges three errors by the trial court: (I) failure to allow Petitioner's attorney to participate in the formulation of a response to a question from the jury during deliberations, (2) allowing the victim's family to wear buttons displaying the victim's photograph during the trial, and (3) exclusion of key evidence essential to Petitioner's defense.

A. Petitioner's Ineffective Assistance of Counsel Claims

Petitioner contends that he was denied his Sixth Amendment right to effective assistance of counsel which required him to protect the defendant's fundamental right to a fair trial. The "benchmark" for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

The Court in *Strickland* outlined the proper analysis of a claim for ineffective assistance of counsel. *Id.* "First, the defendant must establish that counsel's performance was deficient. This requires showing that counsel made errors so

serious that he was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 688. The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. *Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998).

"Second, the Petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 688. The test for prejudice is not outcome-determinative; defendant need not show that the deficient conduct more likely than not altered the outcome of the case. However, a simple showing that the defense was impaired is not sufficient. *Id.* at 693. The Petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the fundamental fairness of the outcome. *Id.*

Petitioner admitted shooting Studer. He claimed that he was in danger and shot in self-defense. The issue before the jury was whether Petitioner honestly believed that he was in danger, or whether he acted with malice and intended to kill Studer. Petitioner asserts that his attorney committed three critical errors in trying his case.

1. Petitioner Claims That In a Homicide Case Where the Defendant's Entire Theory is Self-Defense, the Failure to Present Testimony That the Victim had Explicitly Threatened to Kill Defendant Violated his Sixth Amendment Right to the Effective Assistance of Counsel

a. Petitioner's Argument

Petitioner proffered that in late 1993 his supervisor at work -- Mr. Ruberg, noticed that Petitioner's phone line was in use for an extended period. Finding this unusual, Ruberg listened in on the line. He heard a female yelling at Petitioner, who responded that he did not want his son "over there." The woman began yelling that Petitioner was being uncooperative. The woman's end of the phone was taken over by a man who stated, "You better leave us the fuck alone or I'll kill you." The man then hung up the phone.

Defense counsel did not call Mr. Ruberg to testify during trial about this prior threat against Petitioner. Petitioner then believed and now maintains that the man on the phone was Tom Studer, the victim. This testimony could have been relevant to Petitioner's state of mind on the day he killed Studer. Petitioner asserts there was no tactical justification for this omission. Because his counsel failed to present credible evidence of prior threats of violence by the victim against him, Petitioner asserts that the jury was deprived of significant evidence regarding his state of mind, which was critical to his defense.

b. The State's Response

The State counters that Petitioner failed to show either error or prejudice. The State asserts that defendant's trial attorney did not present evidence of the phone conversation because the attorney was unaware of it. Petitioner cannot claim error on the part of his attorney when in fact Petitioner failed to disclose the facts to him. The State also claims that Petitioner cannot show prejudice. Defendant could have testified about the conversation regardless of whether Ruberg was called. Further,

the State suggests that Mr. Ruberg would not have been permitted to testify as to the identity of the parties, since it would constitute inadmissible hearsay. Respondent maintains that the state court's rejection of Petitioner's *Strickland* contention regarding the prior threat was not clearly erroneous.

c. Legal Analysis

Petitioner alleges that he did tell his trial attorney that he had been threatened at work. However, he failed to give to tell counsel who he believed threatened him. *See* Petitioner's Traverse to Answer, Exhibit A. To satisfy the first prong of *Strickland*, Petitioner must show that defense counsel's failure to introduce evidence was unreasonable. While trial counsel does have a duty to investigate, he is not required to interview every conceivable witness. *U.S. v. Schaflander*, 743 F.2d 714, 719 (9th Cir. 1984). Trial counsel apparently did not know there was a witness who heard both ends of the conversation. Further, Petitioner's declaration does not suggest that trial counsel was informed that the threats could have been made by the victim. Thus trial counsel's failure to investigate was not unreasonable.

Petitioner is also unable to satisfy the second *Strickland* requirement. He cannot show that, but for the failure to introduce evidence of a prior threat, there was a reasonable probability that the result of the proceedings would have been different. The jury heard substantial evidence suggesting malice. Regardless of whether there was justification for firing the first bullet, Petitioner's own testimony refutes the need for firing a second. Mr. Albaugh was with Petitioner's son Garrick and did not have a weapon that could injure Petitioner from a distance (or possibly any weapon at all). Pam Musladin had no weapon. Tom Studer had been struck by the first bullet and was trying to hide under the truck in the garage. If Petitioner truly feared for his life, it is highly unlikely that he would have entered a dark garage after a man with a gun. He could have gotten into his car and safely driven away. Given the particular facts of this case, Petitioner cannot establish that his counsel

was so ineffective as to undermine confidence in the fairness of the result.

2. Petitioner Claims That in a Homicide Case Where the Entire Theory is Self-Defense, the Failure to Present Expert Testimony That the Entry Path of the First Bullet Was Not Itself Fatally Inconsistent With the Self-Defense Theory Violated the Sixth Amendment Right to Effective Assistance of Counsel

a. Petitioner's Argument

Petitioner alleges that after Michael Albaugh yelled, "He's got a gun", (referring to Petitioner), Petitioner looked into the garage where he saw someone else holding a gun. Out of fear, Petitioner fired first. The bullet entered the back side of Tom Studer's shoulder. Petitioner contends that his attorney should have called an expert to explain that the rear entry wound could be consistent with his self-defense theory.

Expert testimony is necessary when lay persons are unable to make an informed judgment without the benefit of such testimony. *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). In support of his contention Petitioner proffers the Declaration of John Thornton, a forensic scientist, who if called would have testified that Studer could have turned his torso after the shot was fired and before being struck. Without this testimony the jury could presume that self-defense was not possible because Studer had his back to Petitioner when he was shot.

b. The State's Response

The State maintains there was no error. Petitioner retained a forensic expert. Trial counsel was entitled to rely on his expert's opinions and conclusions - - even if they contradicted the theory that Studer turned before he was shot. Further, Petitioner's claim that John Thornton was available and could have testified is flawed. Mr. Thornton's evaluation is based on testimony adduced at trial and, therefore, amounts to the fabled

"twenty-twenty vision of hindsight."

The State also disputes Petitioner's contention that he was prejudiced by this failure. There was significant evidence of Petitioner's malice and premeditation. It is unlikely that the failure to present this expert's evidence changed the outcome, since Petitioner entered the garage and shot Studer a second time.

c. Legal Analysis

Trial counsel's failure to consult with more experts was not unreasonable because he retained an appropriate expert whom he thought to be well qualified. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998). Because that expert did not suggest that additional experts in the same field were necessary, counsel did not have a duty to seek out others.

Petitioner cannot show prejudice. Even if his counsel had retained an expert to testify that the entry wound was not inconsistent with self defense, there is no reasonable probability that the result would have been different. The jury did not believe Petitioner's version of the events of the day in question. Even if he feared for his life prior to firing the first bullet, it does not explain his subsequent actions. He walked into a dark garage and shot Studer. Expert testimony that the victim turned his back after Petitioner shot him may not have been convincing. The state court's rejection of Petitioner's claim regarding his counsel's failure to find a better expert is not a clearly erroneous application of *Strickland.*

3. Petitioner Claims That the Failure to Request An Instruction Limiting the Jury's Consideration of Double Hearsay Statements From an Incompetent Witness Violated the Sixth Amendment

a. Petitioner's Argument

During cross-examination of Michael Albaugh, defense counsel attempted to impeach Albaugh's claim that he had warned the others that Petitioner had a gun. Defense counsel

asked Mr. Albaugh why he believed that Petitioner was reaching for a gun when he appeared merely to be reaching into his car. Albaugh testified that his belief was based upon a statement made to him by Petitioner's son Garrick. Defense counsel failed to object or move to strike the answer. On redirect, the prosecutor attempted to elicit further information about the statement. Defense counsel asked to approach, presumably to object to further inquiry about the statement of a young child, and the judge responded by claiming that counsel had "opened the door." The court then overruled the objection.

Petitioner contends his counsel should have requested a limiting instruction as to this double hearsay testimony. Under state law, the responsibility for ensuring that the jury is fully instructed on the principles applicable to the defense theory of the case does not fall upon the trial judge alone. Defense counsel has an obligation to ensure that the trial court does not omit critical instructions. *See People v. York,* 242 Cal.App.2d 560, 572 (1966); *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn.7, *overruled on other grounds.*

Petitioner asserts that because of this error by counsel, the prosecution was able to argue to the jury that the child's alleged statement that Petitioner told him he had a gun and was going to shoot the victim was true. The statement, in fact, was admitted by the trial court to indicate why Albaugh thought Petitioner was reaching for a gun, and not for the truth of the matter asserted that Petitioner had a gun. Without a limiting instruction, however, the jury was free to consider the testimony however it chose.

b. The State's Response

The State maintains that the decision not to request the limiting instruction was a tactical decision made by the trial attorney. Because the testimony was harmful to Petitioner, his counsel reasonably decided not to draw further attention to it. Defense counsel's choice not to pursue a limiting instruction does not fall below an objective standard of reasonableness.

c. Legal Analysis

The decision not to request a limiting instruction is "solidly within the accepted range of strategic tactics employed by trial lawyers in the mitigation of damning evidence." *U.S. v. Gregory*, 74 F.3d 819, 823 (7th Cir. 1996); *Biggerstaff v. Clark*, 999 F.2d 1153, 1155 (7th Cir. 1993), *U.S. v. Malik*, 928 F.2d 17, 23 (1st Cir. 1991), *U.S. v. Miller*, 895 F.2d 1431, 1439 (D.C. Cir. 1990). Accordingly, Petitioner's contention that the failure to request the instruction constituted ineffective assistance of counsel does not satisfy the first prong of the *Strickland* test.

For the aforementioned reasons, Petitioner likewise fails to satisfy the second prong of *Strickland*. Accordingly, the state court's rejection of this ineffective assistance of counsel claim is not contrary to, or an unreasonable application of, the *Strickland* decision.

B. Petitioner's Assertions of Error By the Trial Court

1. Petitioner Claims that the Trial Court's Refusal to Allow Defense Counsel to Participate in Formulating a Response to the Jury's Question About Malice and the Substance of his Answer Violated Defendant's Constitutional Rights

a. Petitioner's Argument

Petitioner's fourth argument arises from a question by the jury on the second day of deliberations. The jury asked the court whether malice could be implied for a first degree murder conviction. When the court received the question, Petitioner's attorney was summoned. Prior to his arrival at the courthouse, however, the judge directed the jury to refer back to the instructions. Thereafter the jury returned a verdict, finding Petitioner guilty of first degree murder.

Petitioner claims that the trial court's failure to wait for his attorney to arrive and assist in the formulation of a response was a violation of his constitutional rights. He maintains that the

question demonstrates the jurors were confused about the issue of malice. Defense counsel would have insisted that the court, rather than referring the jury back to the instructions, explicitly state that express malice is necessary to convict a defendant of first degree murder. By excluding counsel from participating in this process, Petitioner contends that the court denied him the assistance of counsel during a critical stage of the proceedings.

Further, Petitioner claims that the substance of the trial court's response amounted to an abdication of its responsibility to directly and unequivocally resolve the issue of orderly conduct of the trial by jury. The jury requested clarification of a legal issue that was central to the trial. The court had a duty to respond to the question without referring the jury back to the instructions which caused the confusion.

b. The State's Response

The State maintains that this claim is barred by the state court's finding of waiver. The California Court of Appeal pointed out that it was apparent from the record that "counsel was aware of the court's communication with the jury, yet failed to object. Accordingly, the issue is waived." Answer, Ex. F at 23. Respondent suggests that the California Supreme Court implicitly agreed.

The State also argues that federal review of this claim is barred unless Petitioner can show cause for the federal default as well as actual prejudice, or that the failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The State argues that even if Petitioner can demonstrate cause, he cannot show prejudice because the error was harmless. *Chapman v. California*, 386 U.S. 18 (1967).

The State argues that even if error occurred, Petitioner was not prejudiced under the *Chapman* standard. *Id.* The reviewing court must be able to declare beyond a reasonable doubt that the error was harmless. *Id.* at 24. Respondent suggests because the jury instructions included definitions of different types of malice and because the instruction on first degree murder stated that

express malice was required, the jury was properly informed. The court's error was harmless beyond a reasonable doubt.

c. Legal Analysis

1. Waiver

The State is incorrect that Petitioner waived this claim. He first raised it on appeal. The appellate court ruled that the claim had been waived because counsel failed to object. In state habeas proceedings, Petitioner argued that the appellate court resolved the issue with a significant misunderstanding of the facts. The California Supreme Court ordered the State to respond to Petitioner's contention. After reviewing the briefs, the Court simply denied the Petition for Habeas Corpus.

Under California law a state court considering a habeas petition must explicitly rule on procedural bars asserted by the State. If the court denies the petition without specifically ruling on the procedural issue, it is understood that the ruling is on the merits. *In re Robbins*, 18 Cal.4th 770, 814 (1998). Because the California Supreme Court simply denied the petition without addressing the issue of waiver in its order, Petitioner's claim is not procedurally barred.

2. The Trial Court's Substantive Error

Petitioner asserts correctly that the substance of the trial court's response to a jury question was improper. Both Ninth Circuit and California law instruct trial courts to provide straightforward responses to jurors' questions. *U.S. v. Warren*, 984 F.2d 325, 330 (9th Cir. 1993). Courts must decide whether further explanation is desirable or whether reiteration of previously given instructions will suffice. *People v. Moore* (1996) 44 Cal. App. 4th 1323, 1331.

Respondent contends that the standard of review is harmless error under *Chapman*. In *Brecht v. Abramson*, however, the United States Supreme Court specifically held that *Chapman* analysis was inappropriate for habeas review of alleged constitutional error. 507 U.S. 619, 637 (1993). "Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under

Chapman undermines the States' interest in finality and infringes upon the sovereignty over criminal matters." *Id.* at 637. *Brecht* instructs that trial errors be reviewed as to whether the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Id.*, citing *Kotteakos v. U.S.*, 328 U.S. 750 (1946).

This court found no opinion by the United States Supreme Court holding that referring a jury back to its original instructions constitutes a structural error. As both the Petition and Answer rely on a harmless error standard, the parties appear to agree that this is a type of error which does not require automatic reversal. Under *Kotteakos* and *Brecht*, the issue becomes whether the court's response had a substantial and injurious effect or influence in determining the jury's verdict.

In view of the State's evidence against the Petitioner, it cannot be said that the court's response substantially affected the determination of guilt. The testimony of Michael Albaugh regarding the statements made by Garrick Musladin presented strong evidence of Petitioner's intent: he had a gun. The testimony of Michael Albaugh and Pam Musladin regarding the circumstances of the crime further demonstrate this intent. The jury apparently did not believe that Petitioner felt threatened by the victim. A substantively proper response to the question might not have changed the verdict. Accordingly, the state court's rejection of Petitioner's assertion of error in this regard was not contrary to, or an unreasonable application of, established federal law.

3. Was the Court's Response to the Jury in the Absence of Defense Counsel Structural Error?

Some constitutional violations at trial constitute "structural errors" and require automatic reversal of a conviction because they infect the entire trial process. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such an error is prejudicial per se and harmless error analysis is not applicable. The Supreme Court has found structural errors in a very limited class of cases: *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation

of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (lack of an impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial); *Batson v. Kentucky*, 476 U.S. 79 (1986) (unlawful exclusion of petit jurors of defendant's race); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction to jury).

When counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding, the Supreme Court has consistently found constitutional error without any showing of prejudice. *U.S. v. Cronic,* 466 U.S. 648, 659 (1984), citing *Geders v. U.S.*, 425 U.S. 80 (1976), (complete failure of defense counsel to subject prosecution's case to "meaningful adversarial testing"). California courts agree: a defendant "is entitled to the assistance of counsel at all critical stages of the proceedings under the Sixth Amendment of the United States Constitution." *People v. Stewart* (1983) 145 Cal.App.3d 967, 972. Under both federal and California law jury deliberations constitute a critical stage in the trial. *U.S. v. Rosales-Rodriguez*, 289 F.3d 1106 (9th Cir. 2002); *People v. Hawthorne* (1992) 4 Cal. 4th 43, 69.

Under federal law, a key factor in evaluating the constitutionality of a court's response to a question from a deliberating jury, outside the presence of counsel, is whether the court responds substantively or merely refers the jury to its instructions. The Sixth Circuit found harmless error where both the prosecution and the defense were absent when the judge responded to a jury question. The court applied Rule 43, Federal Rules of Criminal Procedure.

The reviewing court found that a defendant's right to be present at every stage of trial was technically violated when the district court failed to contact parties before responding to a note from the jury asking for copies of instructions read to them earlier. However, *the error was harmless where the court did*

not make a substantive response to the note but, rather, perfunctorily responded by providing the jury with a complete written set of all jury instructions read by the court. U.S. v. Harris, 9 F.3d 493, 499 (6th Cir. 1993). (Emphasis added)

California law requires that any questions posed by the jury regarding the law or the evidence must be answered in open court in the presence of the accused and his or her counsel, unless presence is waived. (Section 1138, California Code of Criminal Procedure). Applying this rule, the California Supreme Court held that communication between judge and jury during deliberations without affording defendant and counsel an opportunity to be present impinges on a defendant's constitutional right to the assistance of counsel. *People v. Hawthorne* (1992) 4 Cal.4th 43, 69.

The Court in that case conceded that the trial court technically violated section 1138 by responding to the jury's notes without consulting counsel. *However, the trial judge did not give the jury any substantive instructions*. The jury had asked the bailiff to call the judge at home to ask what they should do if one of their members was undecided. He told them to continue deliberating while he contacted counsel to formulate a response. Before he responded, they informed him they could continue deliberating without further guidance. *Id.* at 64.

At petitioner's trial the judge responded to the jury's question about malice by referring them to the jury instructions, without any substantive response. As discussed above, if defense counsel had been present, the court's action would have been error, albeit probably harmless error, as also explained in the section above, because the judge did not respond substantively to the question. *U.S. v. Warren*, 984 F2d at 330; *People v. Moore*, 44 Cal.App.4th at 1331.

With defense counsel absent, however, this was the only response the judge could give, to avoid depriving petitioner of his constitutional right to counsel at a critical stage in the trial. Accordingly, the error was harmless, and the writ should be denied on this issue.

2. Petitioner Claims That the Trial Court Violated His Right to Due Process When it Allowed the Victim's Family to Wear Large Display Buttons Containing Pictures of the Deceased

a. Petitioner's Argument

Petitioner asserts that the trial court committed error when it allowed the victim's family to wear buttons with the victim's picture throughout the trial. Petitioner argues that the Due Process Clause requires trial courts to safeguard against the "intrusion of factors into the trial process that tend to subvert its purpose." *Estes v. State of Texas*, 381 U.S. 532, 560 (1965). These factors include any courtroom practice that would undercut the presumption of innocence. Petitioner maintains that the buttons were inherently prejudicial and imposed an unacceptable threat to his right to a fair trial.

In reviewing this alleged error, Petitioner suggests a two- step analysis. First, was there an impermissible factor coming into play? *Id.* Second, did the factor pose an unacceptable risk? *Holbrook v. Flynn*, 475 U.S. 560 (1986).

b. The State's Response

The State maintains that the buttons did not result in prejudice. When the defense attorney formally objected to the buttons, the trial judge became aware of the issue. At that time, the judge determined that the buttons would not prejudice the defendant. The State argues that the trial court's finding is supported by the record and deserves strong deference.

The State also points to the opinion of the state court of appeal, as follows:

> In contrast with the buttons in *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990)], the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims in a

courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged, we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt in the eyes of the jurors.' (Answer Ex. F at 21-22.)

c. Legal Analysis

The record reflects that three members of the victim's family each wore a button with the victim's photograph during the trial. The buttons were two to four inches in diameter and contained no words or symbols. The family members sat directly behind the prosecution and next to the jury.

Petitioner is correct in his assertion that a trial judge is required to protect the integrity of the proceedings by disallowing courtroom activity that may undermine the presumption of innocence. "One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . circumstances not adduced as proof at trial." *Holbrook*, 475 US at 567, citing *Taylor v. Kentucky*, 436 US 478, 485 (1978). When factors not adduced as proof are present during a trial, the trial judge must ascertain whether the factors are so prejudicial as to deny the defendant his constitutional right to a fair trial.

In *Estelle v. Williams*, the United States Supreme Court held that requiring a defendant during a trial by jury to wear identifiable prison clothing despite objection constituted a denial of due process and equal protection. 425 US 501, 502 (1976). Justice Burger advised that "courts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." Because prison clothing is likely to elicit a negative impression of the defendant, it potentially undermines the presumption of innocence. Such clothing presents an unacceptable risk of impermissible factors coming into play. *Id.* at 505.

The United States Supreme Court has not specifically addressed the issue of buttons in a trial courtroom. The Ninth

Circuit however, in *Norris v. Risley*, held that the presence of women spectators wearing buttons reading, "Women Against Rape" created a prejudicial environment thereby posing an unacceptable threat to defendant's right to a fair trial. 918 F.2d 828, 834 (1990). The buttons were worn by approximately fifteen members of the Billings Rape Task Force and the word "rape" was highlighted. *Norris* suggests that a practice becomes unacceptable when it undermines the presumption of innocence or the right to confrontation. *Id.* at 831.

Just as the compelled wearing of prison garb during trial can create an impermissible influence on the jury throughout trial, the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence. Moreover, the buttons' message was far more direct than that to be inferred from the wearing of prison attire, which has no communicative purpose. The women who wore the buttons obviously intended to convey a message. *Id.* at 832.

In both *Estelle* and *Norris*, the challenged practice related directly to the respective defendant's guilt. The jurors would infer guilt as a result of the practice. The fact that the defendant was in custody suggested he was dangerous, thereby undermining the presumption of innocence. The "Women Against Rape" buttons suggested that the defendant was a rapist.

The message to be derived from the buttons in this case, however, was not as clear. Although it amounted to a showing of solidarity by the victim's family, it did not necessarily undermine the presumption of innocence. The buttons were not inscribed with the word "MURDERER." The buttons were not worn by fifteen spectators who assumed defendant's guilt before it was proven. The victim's family testified and defense counsel had the opportunity for cross-examination.

The State Courts' rejection of Petitioner's claim was not a clearly erroneous application of *Estelle*. Although allowing the

buttons was arguably not a prudent decision by the trial judge, it cannot be said that it was contrary to or an unreasonable application of clearly established federal law. The writ cannot issue on this assertion of error.

3. Petitioner Claims That the Trial Court Violated His Right To a Fair Trial and His Right to Present a Defense By The Court's Repeated Limitations on Evidence

a. Petitioner's Argument

Petitioner details two instances in which the trial court excluded evidence that Petitioner sought to introduce in his defense. Defense counsel attempted to rebut the prosecutor's implication that the defendant manufactured a theory of self-defense in the intervening time between arrest and trial, by presenting evidence from the defendant, defendant's father, and defendant's brother showing that defendant had explained the self-defense claim on the day of the shooting itself. The second exclusion was of the defendant's testimony showing that he had reason to believe in a need for self-defense at the scene of the shooting; defendant claimed an awareness of drug-related activities taking place at the house and a history of being attacked and observing others being attacked while at the house. This evidence was excluded by the trial court.

Petitioner suggests that the right to present evidence is essential to due process, and that criminal defendants must be permitted to rebut specific theories proposed by the state. Under this analysis the trial court's exclusion of evidence is a violation of the defendant's Sixth Amendment right to present a defense and possibly his Fifth Amendment right to a fair trial. The critical question in analyzing the constitutionality of exclusion of evidence is the importance of the evidence to the defense's case. Petitioner suggests that the excluded evidence would have had a substantial influence on the jury's verdict and should have been admitted.

b. The State's Response

The State maintains that the evidence was properly excluded and that it did not violate Petitioner's constitutional rights. The statements by the defendant's father and brother indicating that defendant had asserted a self-defense theory on the day of the arrest were justifiably excluded by the trial court, because those statements constituted inadmissible hearsay evidence. The State agrees with the state courts' findings that the evidence supporting reasonableness was also inadmissible.

In the event that a challenge to the inadmissibility of the evidence might succeed, the State asserts that the exclusion nonetheless failed to constitute error of constitutionally significant proportions. It reaches this conclusion after application of the five factors in *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990). These factors include: "(1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense."

c. Legal Analysis

There are two subcategories of evidence at issue within this portion of the claim. The first includes evidence that defense counsel sought to introduce on redirect in order to rebut the implication created by the prosecutor that defendant fabricated his self-defense claim after the shooting. The potential evidence consisted of statements by the father and brother of the defendant that he had asserted a self-defense on the day of his arrest. The second subcategory reflects on the reasonableness of defendant's belief that he was in danger from the victim, and includes evidence that defendant knew of drug activity and prior incidents of violence at the house where the shooting occurred.

The first category of evidence was correctly excluded by the trial court. A defendant does not have a right to offer inadmissible evidence unless the defendant can establish that his right to have the jury consider the excluded evidence involves

a "fundamental principle of justice." See *Montana v. Egelhoff*, 518 U.S. 37, 42 (1996). In determining whether Petitioner satisfied this requirement, the court considers: 1) the probative value of the evidence on the central issue, 2) its reliability, 3) whether it is capable of evaluation by the trier of fact, 4) whether it is the sole evidence on the issue or cumulative, and 5) whether it constitutes a major part of the attempted defense. *Tinsley v. Borg*, 895 F.2d 520, 530 (9th Cir. 1990).

Petitioner would have used the evidence to rebut the prosecutor's argument that he had not previously claimed self-defense. Evidence that a defendant has previously claimed self-defense and evidence that he indeed acted in self-defense are not equivalent. For the purposes of both the prosecution and defense, this evidence does little to prove or disprove whether Petitioner acted in self-defense.

The reliability of the evidence is in doubt primarily because it was offered by kin of the defendant and because the implied fabrication may have arisen after Petitioner had a motive for it.

The excluded testimony is the sole evidence of whether Petitioner mentioned self-defense either on the day of his arrest or after the beginning of his trial. However, it is not the sole evidence of his claim of self-defense and serves primarily to rebut the prosecutor's implication that the self-defense theory was fabricated. This implication is only rebuttable by evidence that the defendant acted in self-defense, not merely by evidence that the defendant discussed self-defense with other persons.

Because the evidence in question concerns whether Petitioner mentioned self-defense prior to the trial, and not whether he acted in self-defense, it does not fulfill the fifth prong of the *Tinsley* test by constituting a major part of the attempted defense. It is only a response to the prosecutor's attempts to show the defendant fabricated his self-defense theory after the fact.

Assuming, arguendo, that the trial court excluded the evidence incorrectly, it has not been shown that the exclusion of evidence rises to the level of a constitutional violation.

The second category of evidence concerns Petitioner's awareness of drug activity and prior incidents of violence at the house where the shooting occurred. No threats were made against the defendant by the victim, and the events involved occurred four months to one year prior to the shooting at issue in this case. As the trial court noted (People v. Musladin, No. H01-5159, slip op. at 14-20 (Cal. Ct. App., filed Dec. 9, 1997) (*cert. denied*, filed Mar. 25, 1998)), there was no evidence to suggest that Petitioner reasonably associated the victim or any of the other people present at the house that day with specific threats or attacks against him. Threatening behavior associated with a particular place does not permit generalization of that behavior to everyone residing there. *See id.*

V. SUMMARY AND CONCLUSION

Petitioner alleges that his attorney provided ineffective assistance of counsel at several crucial points in the trial. The first claim, counsel's failure to proffer evidence of a specific threat against Petitioner, does not rise to the level of unreasonableness given the circumstances. Furthermore, even if evidence of a prior threat had been admitted, it would not have outweighed the lack of evidence that Petitioner faced a present threat from the victim at the time that the shooting took place.

The second claim concerns counsel's failure to provide an expert witness who would have testified that the bullet path was not inconsistent with the path of a bullet fired in self-defense. However, counsel called a qualified forensic scientist who did not suggest that other experts were necessary. Even if the bullet had been fired while the victim was facing Petitioner, there was no other evidence that self-defense was justified.

Finally, Petitioner claims that his counsel unreasonably failed to request a limiting instruction as to double hearsay. The failure to request a limiting instruction was reasonable as a tactical decision, and Petitioner cannot show that the outcome

would have been different if such an instruction had been granted.

Thus, Petitioner's claim of ineffective assistance are without merit.

Petitioner also alleges several errors by the trial court. The first is based on the jury's question which was critical to Petitioner's defense during its second day of deliberations. Defense counsel was summoned, but the court, without waiting for him to arrive -- answered the question by directing the jury back to the written instructions. This court finds that the trial's court's response was not error. Although the court might have been obliged to provide a more substantive response had defense counsel been present, in the absence of defense counsel the trial judge responded correctly by not providing the jury with additional instructions or evidence. Accordingly, the writ must be denied as to this issue.

The second alleged error committed by the court is its failure to prohibit the display of buttons featuring a picture of the victim in the courtroom. The buttons did not clearly constitute an unacceptable risk, and while perhaps imprudent, allowing the buttons was not contrary to or an unreasonable application of law.

The third alleged error concerns limitations on two categories of evidence that might have supported Petitioner's self-defense claim. However, both categories were correctly excluded by the trial court.

For all the reasons above, petitioner's writ of habeas corpus must be denied.

IT IS SO ORDERED.

DATED: May 14, 2003

s/_____
JAMES LARSON
United States Magistrate Judge

Filed 12/9/97

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA**

SIXTH APPELLATE DISTRICT

THE PEOPLE,	)	**H015159**
Plaintiff and Respondent,	)	
	)	**Santa Clara County**
v.	)	**Super. Ct. No. 177400**
	)	
MATHEW GUY MUSLADIN,	)	
Defendant and Appellant.	)	
	)	

A jury convicted defendant Mathew Guy Musladin of the first degree murder of Thomas Studer, the attempted murder of Pamela Musladin, burglary, and the assault of Michael Albaugh with a deadly weapon. (Pen. Code, §§ 187; 664/187; 459/460, subd. (a); 245, subd. (a)(2).) He appeals from the judgment of conviction, asserting various evidentiary and procedural errors. We affirm the judgment.

FACTS

Pamela Musladin married defendant on November 14, 1989, and their son Garrick was born March 25, 1991. Pamela filed for divorce in 1992, but the divorce was not yet final at the time the charged offenses occurred on May 13, 1994. Under the custody agreement, Garrick lived with Pamela, while defendant had visitation every other Friday.

Shortly before Pamela filed for divorce, defendant lost his temper during an argument with his wife. Pamela told defendant she wanted to leave him and live at her mother's

house. Defendant responded that a bitch like Pamela was not going to raise his son and that he would kill her first. Defendant proceeded to strangle Pamela. The incident was corroborated by police and medical reports.

On another occasion, Pamela had driven to Sacramento to pick up Garrick at the home of defendant's parents. As she was strapping the child into a car seat, defendant asked her whether she was a "Christian woman." When Pamela responded that she did not have to discuss her beliefs with defendant, he told her she could not have Garrick, removed the boy from the car, and dragged him into the house. When Pamela resisted, defendant shoved her, grabbed her by the hair, forced her into the house, then pushed her onto the couch, and started "ranting about me not coming back. He's wanting me to come back. He was just angry. He was just saying all the things he always said."

Pamela began seeing Tom Studer in February or March of 1993. By October 1993, they planned to marry. On May 13, 1994, the couple was living in the home of Pamela's mother at 539 Bluefield Drive in San Jose.

At approximately 1:30 p.m. on May 13, 1994, defendant arrived at the Bluefield Drive residence to pick up Garrick for visitation. Pamela, Tom, and Garrick were in the back yard, eating lunch. Michael Albaugh, Pamela's brother, saw defendant pull into the driveway, and yelled to Pamela that defendant had arrived. Not expecting defendant to arrive that early,[1] Pamela went into the house to get some clothes for Garrick.

After packing Garrick's things, Pamela went out to meet defendant. Defendant was standing near Tom's pick-up truck, looking inside. Upon seeing Pamela, defendant pointed to the truck and asked Pamela whether the truck "was part of her five

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[1] Pamela testified she had spoken with defendant that morning, and he had told her he would arrive later in the afternoon. She stated defendant had acted peculiarly on the phone.

year fucking plan," an apparent reference to a previous discussion when the two had discussed life plans, and Pamela said she wanted to go to nursing school, support herself, and eventually buy a house. Defendant then said, "I got a call from the district attorney this morning and that's the last straw. I don't have anything left to lose."[2] When Pamela started to cry, defendant threatened, "Either you sign full custody of Garrick over to me right now or I will blow both of your fucking heads off." Pamela started begging defendant, "Guy please, please, please, don't do this. It doesn't - please don't do this." She approached defendant to embrace him, but defendant knocked her hands away and shoved her onto the driveway. Garrick, who was sitting in defendant's car yelled to his father, "Don't hit my mommy."

Watching through a front bedroom window, Pamela's brother Michael saw defendant push Pamela to the ground, and ran outside to help her. Tom also heard the altercation and ran to the front of the house. While Michael attempted to pacify defendant, Tom helped Pamela from the ground.

Standing near his car, defendant reached under the front passenger seat where Garrick was sitting and pulled out a .45 caliber semi-automatic pistol, loaded with hollow-point bullets. Michael yelled, "He's got a gun," while Pamela and Tom started running to the garage. Defendant fired once at Pamela and Tom, hitting Tom in the shoulder. Tom fell, landing beside his truck. Pamela escaped through the back of the garage and ran to a neighbor's house to call 911. Tom tried to crawl underneath his truck. However, defendant walked to the front end of the truck and pointed the gun at Tom's head. While Michael pleaded with defendant to stop, defendant shot Tom in the head.[3]

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[2] The district attorney's office had called about defendant's refusal to pay child support.

[3] Tom's head injury apparently was the result of a ricochet.

Michael ran into the house and dialed 911. While on the phone, he heard defendant enter the house and walk down the hall to the bedroom. Michael dropped the phone, ran into the bathroom, and locked the door. Defendant kicked the door in and pointed the gun at Michael. When Michael pleaded with defendant not to shoot him, defendant lowered the gun and left.

The Santa Clara police officer who heard the dispatch regarding the murder and defendant's flight spotted defendant driving on a nearby freeway. Defendant was finally stopped and arrested. En route to the police station, defendant kept saying, "I didn't mean to do it. I'm sorry," and "Please, officer, forgive me."

At trial, defendant admitted shooting Tom, but claimed self-defense. He testified that when he arrived at the San Jose residence on May 13, 1994, Pamela told him she needed a few minutes to pack Garrick's things. Defendant thought that his wife looked high on "crank" or methamphetamine.[4] Defendant picked up Garrick and put him in the car.

Pamela returned about 10 or 15 minutes later with a diaper bag. Defendant denied the statements Pamela had attributed to him. His testimony was that he told Pamela he was being sued by two credit card companies for debts which belonged to her. In order to avoid the subject, Pamela tried to hug him. Exasperated, defendant pushed her away. Pamela, whose balance was terrible when she was under the influence, stumbled back about three or four steps and landed on her rear.

As defendant took the diaper bag, Pamela started screaming for help. Defendant then heard a commotion coming from inside the house and voices saying "Get him, let's get him" and "There he is, kill the fucking bastard." Defendant was scared, saw his gun case, and grabbed it. He turned around, looked into

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[4] Sergeant Michael Schembri, of the San Jose Police Department, interviewed Pamela at around 5 p.m. after the shooting. Although emotional, she did not exhibit the symptoms of being under the influence of crank.

the garage area, and saw people coming at him. He didn't see any faces, but recognized Michael's body. Michael said something like, "I'm going to do you," and raised his hand in which he was carrying a machete.[5] Still on the ground, Pamela yelled, "Get Garrick first." Defendant turned, took the gun from its case, got the magazine, and loaded the gun.

Defendant heard someone say, "He's got a gun." He saw a person in the garage who had a gun "kind of cocked down"[6] and who was not running, so he focused on him. Afraid for his life, defendant wanted to shoot before he got shot. He fired the gun, and thought he hit the person in the garage. He then moved up the driveway, away from Garrick, heard a loud noise, and fired again toward the right side of the garage where the noise had come from.

Stunned and scared, defendant got into his car and drove away, not realizing somebody was dead. Defendant did not intend to murder Tom or Pamela. He denied following Michael into the house after the shooting. Defendant admitted making incriminating statements to the police while en route to the police station, but explained that he was in shock and confused; he did not remember the ride too well.

Defendant stated that he had purchased the gun in compliance with all legal requirements in December of 1993. He bought the gun for protection when he was panning for gold. Defendant showed the gun to Garrick, just as he showed him everything. Defendant had planned to go gold panning with friends on May 9, but someone had canceled. He left all the equipment, including the gun, in his car.

Defendant's story was corroborated by several witnesses. Scott Owens, defendant's best friend, testified he had often gone gold panning with defendant and had seen the gun which defendant brought for protection against mountain lions.

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[5] Pamela denied her brother was carrying a machete.

[6] Pamela testified Tom had nothing in his hands.

Jacquelyn Schuller testified that she had planned to go gold panning with defendant and Cheryle Reed on May 10, but was called to work and could not make it. Cheryle Reed testified that because Schuller had an interview, the trip was canceled and they were going to go sometime the next week.

James Meeker, chief forensic toxicologist at Oakland's Institute of Forensic Science, testified that Tom's post-death blood sample tested positive for methamphetamine at levels of 1.55 micrograms per milliliter and 0.19 mcg/ml of amphetamine. The victim was "definitely under the influence," because people who test positive are usually only in the 0.1 to 0.5 range. Meeker stated that the usual side effect of this higher range were distorted feelings, increased anxiety, hyperactivity, mood swings, impaired judgment, irrationality, paranoia and aggressiveness. He concluded that it would not be unusual for someone operating under Tom's level of intoxication to become violent or confrontational.

DISCUSSION

Hearsay Testimony by Garrick

After the prosecution gave notice of its intention to call defendant's son, who was three years old at the time of the shooting and four-and-one-half at the time of trial, defendant moved to exclude the testimony on competency grounds. Following a competency hearing, the court granted defendant's motion.

During cross-examination of Michael Albaugh, defense counsel attempted to impeach Michael's claim that he had warned the others that defendant had a gun by referring to his testimony that defendant retrieved, turned, and fired the gun in one instantaneous motion, leaving no time for the warning:

"Q. There was one continuous motion that you observed, motion of him going down, getting a gun, turning around, leveling that and firing, is that correct?

"A. Yes.

"Q. But you had time to say, 'He's got a gun,' right?

"A. I said, 'He's got a gun' before he pulled it out when I saw

him reaching under the seat.

"Q. Oh, Mike. You knew he was going to pull a gun out?

"A. Yes, because previously Garrick had told me that he had that, his daddy had a gun." Defense counsel failed to object or move to strike Michael's answer.

When the prosecutor sought to explore Michael's testimony on redirect, the following colloquy occurred:

"[Prosecutor]: Mike, your nephew Garrick told you that the defendant showed him a gun, correct?

"A. Yes, he did.

"[Defense Counsel]: Your Honor, may we approach the bench here, Your Honor?

"THE COURT: You opened the door.

"[Defense Counsel]: I understand.

. . . . . .

"THE COURT: Objection overruled.

"[Prosecutor]: And when did he tell you that?

"A. About a month prior to this.

"Q. And where were you when he told you this?

"A. At our house.

"Q. And what did Garrick tell you?

"A. He said his daddy had a gun, he was going to shoot Tom with it.

"Q. And you had that in mind when you saw the defendant reach under the seat?

"A. Yes, I did.

"Q. And because of what Garrick had told you, you had a bad feeling that the defendant was going to arm himself at that time?

. . . . . .

"Q. So the two statements that you remember Garrick telling you is that his father had a gun?

"A. Yes.

"Q. And he intended to use it against Tom?

"A. Yes.

"Q. And this is how much prior to the homicide where the defendant killed Tom?

"A. About a month."

On appeal defendant contends the trial court should have excluded Garrick's entire statement as inadmissible multiple hearsay. He maintains that Garrick's statements lack sufficient guarantees of trustworthiness and do not fall within any exception to the hearsay rule. We disagree.

It is settled that a judgment will not be reversed because of an erroneous admission of evidence unless a timely objection was made in the trial court on the precise ground being raised on appeal. (Evid. Code,[7] § 353, subd. (a); *People* v. *Bury* (1996) 41 Cal.App.4th 1194, 1201.)

Defendant cites *People* v. *Wattier* (1996) 51 Cal.App.4th 948, 953 for the proposition that "an evidentiary issue should be addressed on appeal even if it was only marginally preserved when the question of its preservation 'is close and difficult . . . .'" This is not the law. *Wattier* quotes *People* v. *Bruner* (1995) 9 Cal.4th 1178, 1183, footnote 5 for this holding. However, the *Bruner* footnote dealt with the issue of defense counsel's failure to object to the trial court's denial of credit for presentence custody, a sentencing, rather than evidentiary, issue.

In the present case, the defense failed to object when Michael first stated that Garrick had said his father had a gun. It was not until redirect when the prosecutor attempted to explore this testimony that defense counsel asked to approach the bench. Assuming, as the court did, this constituted an objection, counsel never stated the specific ground of the objection. In his reply brief defendant argues that this court should not consider the issue waived since the trial court denied counsel the opportunity to approach and make the record clear.

Even if we assume that defense counsel raised a proper objection, no error occurred. Neither the statement that defendant had a gun nor the statement that he was going to shoot Tom constituted hearsay as they were not offered for the truth of the matter asserted. Rather, they explained Michael's

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[7] All further statutory references are to the Evidence Code.

state of mind at the time. Michael was aware that defendant had a gun prior to seeing it, because Garrick had told him both that his father had a gun and that he intended to use the weapon against Tom.

Defendant also asserts the statement that defendant intended to shoot Tom with the gun should have been excluded pursuant to section 352, even if was not hearsay. Here, again, we disagree. It must be remembered that defense counsel attempted to impeach Michael's claim that he had warned the others defendant had a gun. He impliedly asked how Michael knew defendant had a gun prior to actually seeing it. The fact that Garrick had not only said his father had a gun, but intended to use it was probative on the issue of Michael's state of mind. The idea that somebody has a gun does not mean that person is going to pull it from his car. The belief that defendant had previously threatened to shoot Tom was probative as to why Michael yelled out a warning. Although the statement was also prejudicial, we cannot say the court abused its discretion in overruling defendant's objection.[8]

Evidence of Self-Defense

Defendant contends he was deprived of his right to due process and a fair trial by the trial court's erroneous exclusion of evidence of his prior assertions of self-defense and the prosecutor's exploitation of these errors in closing argument. He specifically asserts 1) it was error to exclude evidence of his state of mind when he was interrogated by the police, 2) the prosecutor committed *Doyle*[9] error, and 3) he was prevented from presenting rebuttal evidence.

In defendant's first assertion he claims that although he was allowed to testify to his feelings of shock at the time of his

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[8] Having reached the conclusion that Garrick's statements were admissible, we need not decide whether defendant was denied effective assistance of counsel.

[9] *Doyle* v. *Ohio* (1976) 426 U.S. 610.

arrest and transportation to the police station, he was prevented from stating that these feelings developed into fear and intimidation at the police station. He maintains the excluded evidence explained why he did not make a self-defense claim at this time. Defendant's claim is based on the following exchange during direct examination by defense counsel:

"A. They brought me into a room. . . . I remember - the next clear memory I have is that he said he was charging me with one count of first degree murder.

"Q. What was your response to that, if anything, Guy?

"A. I said I didn't murder -

"[Prosecutor]: Objection.

"THE COURT: Pardon.

"[Prosecutor]: Objection.

"THE COURT: Sustained.

"Q. Were you frightened by this officer or any other officer?

"[Prosecutor]: Objection, Your Honor. Relevance.

"THE COURT: Sustained.

"Q. Did they advise you of your rights, Guy?

"A. Another man came in. I keep -- I believe it was a Hispanic man. I don't know the name, I'm not sure. But he read me my rights."

"Q. And did you exercise your rights?

"A. I said this isn't really happening but if it is I need a lawyer. You know, I said I can't -- this isn't happening.

"Q. Did you feel intimidation by these officers?

"[Prosecutor]: Objection, Your Honor. Leading.

"THE COURT: Sustained.

"Q. What was going through your mind after you had exercised your right to these officers?

"[Prosecutor]: Objection. Relevance.

"THE COURT: Sustained."

Defendant's claim must be rejected for the simple reason counsel never made clear the relevancy of his questions. He never specifically asked defendant why he had not mentioned self-defense at the police station.

Defendant's cited authorities, *Crane* v. *Kentucky* (1986) 476 U.S. 683 and *United States* v. *Roark* (11th Cir. 1985) 753 F.2d 991, are inapposite to the case at bench. Those cases hold it is error to exclude evidence suggesting the unreliability of a confession. In this case, defendant does not attempt to challenge the credibility of what he said. Rather, he is attempting to explain his silence concerning the self-defense claim.

Defendant next claims *Doyle* error based on the prosecutor's following cross-examination on his self-defense claim:

"Q. All right. So now you're in the ride home or in the ride from [highway] 101 to the police station and now you're beginning to remember - you're concerned that, I got this gun in the car, correct?

"A. Yes.

"Q. And now you've remembered that you may have shot and hit somebody, right?

"A. Yes.

"Q. So why don't you, at that time, sir, tell the police on the way from 101 to the police station that they came after me and made all these death threats against me?

"A. I don't think I mentioned that until later. I was just in shock. I was stunned.

"Q. Sir, you never mentioned that.

"A. I may have.

"Q. Sir, has anyone in this court testified besides yourself to self-defense?

"A. Excuse me?

"Q. Has anyone in this court in the course of this trial besides yourself ever mentioned that you said you did it in self-defense?

"A. I don't believe so."

At the outset we note that the Attorney General urges this court to hold that a defendant must timely object to *Doyle* error or waive the issue on appeal. (See, e.g., *People* v. *Kelly* (1981) 125 Cal.App.3d 575, 581.) However, as recently acknowledged, the Supreme Court has never applied the waiver

doctrine to *Doyle* error. (See *People* v. *Evans* (1994) 25 Cal.App.4th 358, 369.) Accordingly, we address the claim of error on its merits.

Doyle holds that once an arrestee chooses to remain silent after being admonished pursuant to *Miranda* v. *Arizona* (1966) 384 U.S. 436, the prosecution cannot use the fact of that silence to impeach an exculpatory story told for the first time at trial. In *Fletcher* v. *Weir* (1982) 455 U.S. 603, 607, the high court explained that its holding in *Doyle* applied only when *Miranda* warnings had first been given. The court stated, "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." Thus, the admission of evidence of pre-*Miranda* silence to rebut a defense claimed for the first time at trial is permitted. (*People* v. *Delgado* (1992) 10 Cal.App.4th 1837, 1841-1842.)

In the present case, it is clear that any questions regarding defendant post-arrest, pre-*Miranda* silence regarding self-defense were admissible. Defendant maintains that the prosecutor's question, "Has anyone in this court in the course of this trial besides yourself ever mentioned that you said you did it in self-defense?" implicitly urged the jury to infer from defendant's post-*Miranda* silence that he had recently contrived his testimony. However, given the context in which the question was raised, the question merely related to defendant's pre-*Miranda* silence.

Finally, defendant asserts he was prevented from presenting evidence to rebut the inference of recent fabrication. Recognizing that the prosecutor's questions had undermined the defense, defense counsel attempted to present testimony by defendant's father and defendant himself that defendant had disclosed his self-defense claim long before trial. A portion of the direct examination of defendant's father was as follows:

"Q. Now, Mr. Musladin did your son call you on May 13, 1994?

"A. Yes, he did.

"Q. Did he call you from the county jail?

"A. Yes.

"Q. And did he tell you that -

"[Prosecutor]: Objection, Your Honor. Hearsay.

"[Defense Counsel]: Your Honor, I think he's opened up the door about this self-defense, Your Honor.

"[Prosecutor]: No.

"THE COURT: No. This is still hearsay."

Additional evidence that defendant called his father and brother from jail on May 13, was also excluded.

Defendant submits the testimony was admissible over a hearsay objection pursuant to section 1236 as a prior consistent statement. However, that statute requires the evidence be offered in compliance with section 791. Section 791 provides in relevant part: "Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: . . . (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated . . . and the statement was made before the . . . motive for fabrication . . . is alleged to have arisen."

We agree with the Attorney General that section 791 is inapplicable on its face. It is undisputed that defendant phoned his father and brother from the police station after Tom was shot, i.e., after his "motive for fabrication . . . is alleged to have arisen." When a prior consistent statement is made by a criminal defendant after he has been charged with first degree murder, we find no merit to the contention that "defendant's most compelling time to fabricate a defense would occur at the time the case was set for trial after the period of pretrial motions."

Evidence of Michael Albaugh's Violence and Drug Use

Defendant contends the trial court erred by excluding evidence of Michael Albaugh's 1986 misdemeanor convictions for resisting arrest and possession of a nunchaku as well as his

history of drug use. He asserts the evidence was necessary to show a "common scheme" under section 1101, subdivision (b) in support of defendant's self-defense claim. He maintains the evidence was essential to show he was already reasonably afraid of Michael because of his past history. We disagree.

"It has been said that a trial court is vested with wide discretion in determining the relevance of proffered evidence. However, it has also been said that in determining the admissibility of evidence proffered by a defendant in a criminal case, a trial court should give the defendant the benefit of any reasonable doubt. But this does not mean that a trial court is required to allow the defendant to define the issues or to introduce evidence without regard to its relevance to the issues defined by law. A trial court has no discretion to admit irrelevant evidence." (*People* v. *Honig* (1996) 48 Cal.App.4th 289, 342-343, internal citations omitted.)

Evidence of prior bad conduct is admissible only where the evidence is relevant to prove some fact, such as common plan or scheme, other than the disposition to commit such an act. (§ 1101, subd. (b).) To establish a common plan or scheme, the evidence must demonstrate not merely a similarity in the results, but "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*People* v. *Ewoldt* (1994) 7 Cal.4th 380, 393, internal quotation and citation omitted; see also, *People* v. *Balcom* (1994) 7 Cal.4th 414, 423.) In addition, there must be a connecting link between the prior and present acts. (*Ewoldt, supra*, at p. 397.)

According to a police report from the 1986 incident,[10] Michael and three friends approached a police officer in a threatening manner. Michael was carrying a nunchaku. When the police officer drew his baton, Michael threw the nunchaku in some nearby bushes. Michael did not strike or attempt to

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[10] The report is not part of this record. Rather, the summary of facts is taken from the arguments presented by the prosecutor and defense counsel.

strike the officer, with or without the nunchaku. He did give the officer a verbal bad time. This incident lacks the concurrence of common features as defendant alleges occurred on May 13. In addition, there is no connecting link between the two incidents.

Moreover, "evidence of prior misconduct committed with persons other than the prosecuting witness . . . is admissible to show a common design or plan where the prior offenses (1) are not too remote in time, (2) are similar to the offense charged, and (3) are committed upon persons similar to the prosecuting witness." (*People* v. *Ewoldt, supra*, 7 Cal.4th at pp. 397, internal quotation and citation omitted.) Defendant failed to meet any of these requirements. Accordingly, we find no abuse in the trial court's exclusion of the 1986 misdemeanors.

We find even less merit in defendant's claim that the trial court limited evidence of Michael's history of drug abuse. On direct examination Michael admitted that he had used methamphetamine on the night before the murder. On cross-examination, defense counsel questioned him about his recent use of the drug and how methamphetamine affected him generally and on the day of the murder. Cross-examination by the defense was only limited on the time fime prior to "several days" before the murder. Such evidence was irrelevant.

Violence at Pamela's House

In an attempt to bolster the claim that defendant experienced fear and trepidation each time he went to Pamela's house, the defense attempted to introduce evidence that 539 Bluefield Drive was an unsavory site of drugs and violence. Defendant contends he was prevented from demonstrating that events occurring over an extended period of time cumulatively contributed to his belief he needed to act in self-defense at the time of the shooting.

Defendant's contention is based on the exclusion of three types of evidence. The first involved a neighbor's report that he thought he heard gunshots coming from Pamela's house during New Year's. The neighbor never saw who was shooting; nor

was he sure they were shots rather than firecrackers. Defense counsel argued that the prosecutor wanted to hide the fact that Pamela's home was a crank house, that cranksters are violent, have weapons, and shoot weapons. He asserted that if he was not permitted to show that these people were aggressive and violent, the court was taking away defendant's defense. The court excluded the evidence pursuant to section 352.

Exclusion pursuant to section 352 was proper. Evidence that shots, if indeed they were shots, were heard coming from Pamela's house four months prior to the May 13, 1994 crimes, was hardly probative. There was no indication that defendant was aware of the incident. Thus, the incident in no way contributed to defendant's alleged fear.

Recognizing that defendant wanted to present "evidence that Pamela's home was a nest of violence," the court subsequently stated that the admission of such evidence would depend on evidence introduced by defendant. During direct examination, defendant attempted to testify about Michael's drug activities. When defendant sought to disclose events that occurred the weekend before Easter of 1993, the court sustained the prosecutor's objection to the evidence. There was no abuse of discretion by the trial court in ruling that evidence of drug activity more than one year prior to the shooting was irrelevant.

Finally, defendant attempted to testify about three specific instances of violence committed at Pamela's house by Michael's friends:

"[Defense Counsel]: Your Honor, just so I understand the ruling, for the record, my client is not permitted to testify as to any prior pattern of violence at the Albaugh residence when he lived there?

"THE COURT: Say again.

"[Defense Counsel]: My client is not permitted to testify as to any prior pattern of violence that he experienced at the Albaugh residence prior to May 13 of 1994? That's been excluded from this trial? That's my understanding of the ruling?

"THE COURT: Well, there has been no testimony to prior acts.

"[Defense Counsel]: That's why I wanted to recall him, Your Honor.

. . . . . .

"THE COURT: . . . [A]re you speaking of acts of violence against your client?

"[Defense Counsel]: Yes.

"THE COURT: By residents of that house?

"[Defense Counsel]: That's correct, Your Honor. And I hope I have made myself clear for the record, that's what I'm talking about.

"[Prosecutor]: Even if those are to be believed, those occurred four years prior.

"THE COURT: What's your offer of proof on this, Mr. Taranto?

"[Defense Counsel]: There was a situation one time in the garage when he was out there playing darts and people were using methamphetamine and somebody came at him with a broken beer bottle.

"[Prosecutor]: Who and dates?

"THE COURT: Well, just a minute. I want to hear the offer of proof. Someone came out from the garage with a broken beer bottle and attacked your client?

"[Defense Counsel]: Yes, Your Honor. It was in the garage, I believe.

"THE COURT: Who was the individual?

"[Defense Counsel]: Steve Johnson. Dave Johnson.

"THE COURT: Not a party to this case?

"[Defense Counsel]: Not a party to this case.

"THE COURT: All, right. That will be excluded.

"[Defense Counsel]: Okay. There was other evidence of threats being made to him by Michael Goyett. His name has been mentioned. That was the person Mr. Michael Albaugh was snorting methamphetamine with the night before and was watching the Sharks game. That again would go to his state of

mind as to the *Flannel* defense where he may have actually had a belief, in danger, but that belief by the jury could be unreasonable. Okay.

"THE COURT: You speaking of threats made by Michael Albaugh?

"[Defense Counsel]: No, Mike Goyett, one of dear friend [sic] of Michael Albaugh who he was with the night before.

"THE COURT: Again, that would be excluded, not a participant in this particular incident.

"[Defense Counsel]: Finally, Your Honor, the other incident was he was in the garage, again playing darts. There was a couple of Mike's friend[s] in there and couple of people came by on motorcycles and came up, two of Mike's friends, and beat him up right in the garage there. He saw that pattern of violence.

"THE COURT: Again excluded."

Relying on *People* v. *Minifie* (1996) 13 Cal.4th 1055, defendant challenges the exclusion of this evidence on the grounds it was relevant to his self-defense claim. Such reliance is unwarranted.

In *Minifie*, the defendant assaulted Tino, a man who was a friend of Jackie Knight, a man the defendant had previously killed. The defendant claimed self-defense. At trial he attempted to introduce evidence that the Knight family had a reputation for violence, for making threats with the means of carrying them out both in and out of prison, and for being extremely dangerous. After the killing defendant had been threatened both directly and indirectly. He had been threatened and attacked while incarcerated. His wife heard of threats from friends of the Knight family. He was afraid of the Knights finding out where he was. He was scared that he would be killed. On the night of the shooting, the defendant was in town because his close friend had been killed by a friend of the Knights. The defendant knew Tino by sight. He was aware that Tino was a very close friend of Jackie Knight. He knew Tino had a reputation for violence. He was scared of Tino and

associated Tino with the Knight crowd. The trial court excluded the evidence pursuant to sections 1101 and 352 and the defendant was convicted of assault with a deadly weapon among other offenses.

The Supreme Court affirmed the Court of Appeal's decision reversing the defendant's conviction for assault. The court held that "evidence of third party threats is admissible to support a claim of self-defense if there is also evidence from which the jury may find that the defendant reasonably associated the victim with those threats." (*People* v. *Minifie*, *supra*, 13 Cal.4th at p. 1060.) The high court explained that the test "is not whether the victim adopted the third party threats, but whether the defendant reasonably associated the victim with those threats." (*Id.* at p. 1068.)

In this case, defendant fails the test. At best, defendant offered evidence that he had been either threatened or attacked by third parties. However, there was no evidence offered to associate Tom Studer, Pamela Musladin or Michael Albaugh with those threats. Indeed, there was no evidence to explain the motive for the threats. Defendant may not claim self-defense merely because he fears a location, rather then an individual.

Photo Buttons of Victim

Immediately prior to opening statements, defense counsel moved to direct members of the Studer family in the courtroom not to wear display buttons with a photograph of the murder victim Tom Studer:

"[Defense Counsel]: . . . And this is about this matter and I just want to put on the record, Your Honor. This is in all due respect to the Studer family who is present here in the courtroom. [¶] I think it's inappropriate. They are wearing buttons that show a photograph of the decedent. I would like to just say for purposes of the record, Your Honor, this is a jury trial. If it was a court trial, I wouldn't mind. As jurors sit here, they have natural feelings and natural passions. They could be inflamed over the fact that there was a photograph on Ms. Studer's breast or photograph of the decedent on Mr. Studer's

chest or on the brother's chest. I just think it's inappropriate, Your Honor. I would like to have -- they can stay here. There is no problem with that.

"THE COURT: I understand that. The button has nothing except a photograph?

"[Defense Counsel]: That's correct, Your Honor.

"THE COURT: The jury's already been instructed not to let passion to prejudice influence their verdict and they will again be instructed at the close of the case on the same subject. There is no legend on the buttons. I see no possible prejudice to the defendant. The motion to have those removed is denied."

Defendant now contends he was denied his constitutional rights to due process and a fair trial because Tom Studer's family were permitted to wear photo pins of the victim in front of the jury. The issue has never been decided by a California court.

We first note the record is somewhat incomplete. It fails to disclose the size of the buttons, the number of Studer family members wearing the challenged buttons on subsequent days of trial, and whether the jurors could even see and recognize the photo button as depicting the murder victim. Nevertheless, we proceed on the basis of the record before us.

In order for defendant to prevail on his claim of being denied a fair trial he must show either actual or inherent prejudice.[11] (*Holbrook* v. *Flynn* (1986) 475 U.S. 560, 570.) "The test for inherent prejudice is not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play. This test requires us to examine two factors: first, whether there is an impermissible factor coming into play and second, whether it poses an unacceptable risk." (*Woods* v. *Dugger* (11 Cir. 1991) 923 F.2d 1454, 1457, internal quotations and citations omitted.)

In *Norris* v. *Risley* (9th Cir. 1990) 918 F.2d 828, the federal

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[11] There is no claim of actual prejudice by defendant.

court granted habeas relief to an inmate whose state trial for rape and aggravated kidnapping were conducted while spectators wore "Women Against Rape" buttons in front of the jury. The Ninth Circuit found "the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." (*Id.* at p. 831, fn. omitted.)

In contrast to the buttons in *Norris*, the message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of family member. While we consider the wearing of photographs of victims in a courtroom to be an "impermissible factor coming into play," the practice of which should be discouraged, we do not believe the buttons in this case branded defendant "with an unmistakable mark of guilt" in the eyes of the jurors. (See *Holbrook* v. *Flynn, supra*, 475 U.S. at pp. 570-571.)

Court Response to Jury Question

On the second day of deliberations, the jury sent the following note to the court: "We need amplification of the following: [¶] 1) The definition of Murder of the first degree contains the phrase 'express malice' -- . . . (a) Does this exclude 'implied' malice?" The trial court refused to answer the question and merely wrote across the jury note, "Refer to the instructions."

Defendant argues the court's response to the jury's question violated Penal Code section 1138,[12] because counsel was not notified of the communication and neither counsel nor defendant were present when the court gave its response. We

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[12] Penal Code section 1138 provides: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

find the issue has been waived.

When counsel does not object to the court's failure to provide earlier notice or to the manner in which the court responded to the jury's request, the defense waives the trial court's error in failing to notify counsel and the response given to the jury. (*People* v. *Price* (1991) 1 Cal.4th 324, 414; *People* v. *Jennings* (1991) 53 Cal.3d 334, 383.)

At the hearing on defendant's motion for new trial, defense counsel challenged the trial court's response to the jury question, and commented: "When the defense arrived that day, after being called that the jury had a question, the answer had already been given and the jury had already been sent back to the jury room. The defense was deprived of the chance at that point to discover the issue of the confusion and to ask that it be clearly and simply addressed. That, yes, absolutely you must find express malice for first degree murder." It is apparent from this statement that counsel was aware of the court's communication with the jury, yet failed to object. Accordingly, the issue is waived.

Voir Dire

Defendant contends the trial court erred in refusing to permit defense counsel to question prospective jurors on their attitudes regarding the acquittal of O.J. Simpson which occurred one week before trial. He maintains that the immediate aftermath of the Simpson verdict was the worst possible time to defend a man charged with murder in a domestic violence case. He concludes he should have been permitted to ask questions with sufficient specificity to enable him to utilize his peremptory challenges.

Defendant correctly contends that on voir dire defense counsel should be permitted to ask questions reasonably designed to assist in the intelligent exercise of peremptory challenges. (*People* v. *Wash* (1993) 6 Cal.4th 215, 253.) Nevertheless, the trial court retains considerable discretion to contain voir dire within reasonable limits. (*Ibid.*) "Abuse of discretion is found if the questioning [of jurors] is not

reasonably sufficient to test the jury for bias or partiality." (*People* v. *Chaney* (1991) 234 Cal.App.3d 853, 861.)

Our review of the record indicates the jurors below were questioned about physical assault, domestic abuse, divorce, child custody and publicity about crime. The questions fully covered the information defendant sought with his questions about the *Simpson* case.

Without moving this court to take judicial notice, defendant points to the retrial of the *Menendez* case, and observes that "other courts which began trials at the same time recognized the potential impact of the [Simpson] verdict so clearly that they conducted Simpson-related voir dire, sua sponte."[13] The comparison is pointless. Both the *Simpson* and *Menendez* cases were high-profile trials with extensive media coverage. It was logical to question *Menendez* jurors, who potentially would be subjected to the same media attention, whether this would affect their performance as jurors. No such rationale was present in the case at bench. The court did not abuse its discretion.

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[13] According to defendant, the judge in the *Menendez* case asked the jury: "As you're most likely aware, the case of *People* v. *Simpson* has been concluded and a verdict was reached in that case and it received quite a bit of coverage in the news media, and my first question to you as a group is -- to some extent this was covered in the questionnaire we gave you . . . [b]ut going beyond that now to the result of that case . . . do any of you feel that that result and the way it's been reported and commented on by the media and the public in general, whether that will have any impact on you as you perform your role as a juror in this particular case?"

DISPOSITION

The judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Elia, Acting P.J.

_____
Wunderlich, J.

People v. Musladin
H015159

Filed 3/25/98

Sixth Appellate District No. H015159

S067385

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent,

v.

MATHEW GUY MUSLADIN, Appellant.

Appellant's petition for review DENIED.

s/_____
Chief Justice

Filed 1/6/98

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,	**H015159**
Plaintiff and Respondent,	
	(Super. Ct. No. 177400)
v.	**Santa Clara County**
MATHEW GUY MUSLADIN,	
Defendant and Appellant.	

BY THE COURT*:

Appellant's petition for rehearing is denied.

Dated: JAN 6 – 1998 WUNDERLICH, J. Acting P.J.

*Before Wunderlich, Acting P.J., and Mihara, J.

Filed 6/2/00

S079768

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN RE MATTHEW GUY MUSLADIN

ON

HABEAS CORPUS

Petition for writ of habeas corpus is DENIED.

s/_____
Chief Justice